

Supplication

21

In the Supreme Court of the State of California.

MARY WELCH,
APPELLEE,

VS.

JOHN SULLIVAN,
APPELLANT.

ARGUMENT FOR APPELLANT,
CONCERNING THE OWNERSHIP OF LANDS BY PUEBLOS.

N. BENNETT, OF COUNSEL.

SAN FRANCISCO:
O'MEARA & PAINTER, PRINTERS, 182 CLAY STREET.

1857.

Thompson

SUPREME COURT.

MARY WELSH,	}	BRIEF OF APPELLANT.
<i>vs.</i>		
JOHN SULLIVAN,		
<i>And Others.</i>		

§ 1. In ejectment, the plaintiff must recover on the strength of his own title. Every substantive fact, required by law to make out his claim, must be proved. No fact will be presumed in his favor. In the deduction of title, every *mesne* conveyance, through which he claims, must, like any other fact, be established by proof. If he claims under an execution sale, he must not only prove the execution and judgment, but he must also establish ownership of the land in the judgment debtor, as one of the necessary steps in the deduction of his title. These are elementary propositions.

§ 2. This is an action of ejectment. The plaintiff claims under an execution sale. The judgment debtor is the city of San Francisco. The plaintiff can recover only what the city of San Francisco is proved to have had, and, if the city had nothing, the plaintiff can recover nothing. Again, though the city may have had an interest, yet, if it were of such a nature that it could not be taken under a forced sale—for instance, if the city were a naked trustee, holding the premises in trust for the inhabitants in general, without any beneficial interest in herself, then she had no interest which passed to the plaintiff upon which ejectment can be maintained. From these considerations two questions arise :

First, did the city of San Francisco own the premises? In other words, was the fee of the land vested in the city, or did it still remain in the government?

Secondly, conceding that the city of San Francisco held the fee, or had some claim, right or title, legal or equitable, in the premises, was such claim, right or title, whatever it may have been, the subject of levy and sale on execution?

§ 3. I maintain the negative of both the above questions, and I assert as propositions, which I shall endeavor to make clear.

First, the city of San Francisco was not the owner of the premises—that is to say, the fee of the land was not in the city, but still remained in the government.

Secondly, conceding that the city had some estate right or interest—it was not subject to sale on execution.

§ 4. First then, as to the vested estate in the city—I have said that the burden of proof lay on the plaintiff to prove the interest of the city, but a very strange anomaly in ~~this~~ *nisi prius* trials presents itself in the progress of this cause. The rule I have stated, had been adhered to by lawyers and judges in this country and in England, from the earliest ages of our juridical history; and it had been supposed to be settled, that, in an action of ejectment, it lay with the plaintiff to establish by proof, that he and those under whom he claimed had the title, and that the burden of proof was not, in the first place, cast on the defendant to prove that the plaintiff had no title. And this rule of law was supposed to be so well founded on good sense and justice, that it had been held universally applicable, not only in actions of ejectment, but in all other actions, so that it might be said to have become an axiom in legal science, that the law would not require a party to prove a negative—that it would not call upon the defendant to disprove the alleged title of the plaintiff, until the plaintiff himself had adduced some evidence tending to establish it—that it would not deprive a person of the enjoyment of a right in possession solely because he might not be able to disprove every unsupported claim which could be alleged against him.

This rule however, by which justice had been administered for a thousand years, was deemed inapplicable to the condition of affairs in San Francisco, and derogatory to the advancement of legal science in the nineteenth century—while the strange doctrine was sustained by the Court, that, in an action of ejectment, where the plaintiff claimed under an execution sale, title in the judgment debtor would be presumed without proof, and that the burden of disproving this unsustained allegation of the plaintiff lay upon the defendant. Is this law?

§ 5. I notice this here, to show how far the settled rules of evidence have been departed from, in order to help the plaintiff to recover. If the plaintiff had been held to abide by the law, and to prove her case like other plaintiffs, there would have been no cause for apprehension on the part of the defendant; but as it would have been highly inconvenient for the plaintiff to be obliged to prove a fact which did not exist, the Court kindly helped her out of the difficulty by *presumption*.

§ 6. But, notwithstanding all the aid which the plaintiff may derive from the unheard of presumption above referred to, *it appears beyond doubt, from the law applicable to the case, THAT THE CITY OF SAN FRANCISCO HAD NO TITLE.* And I shall proceed to show that this is so:

First: By the decisions of this Court:

Secondly: By the decisions of the Board of U. S. Land Commissioners for California:

Thirdly: By the decision of the Circuit Court of the U. S., for this circuit:

Fourthly: By the decision of the Supreme Court of the United States.

Fifthly: By the Spanish and Mexican law.

§ 7. First, then by the decisions of this State.

The first case in which this question was presented, was the case of *Woodworth vs. Fulton* (1 Cal. Rep., 295.) In that case there was no proof of ownership in the city of San Francisco, or in the town or pueblo of that name, nor

was it explained whence or how any title was acquired. The Court there held, that if the city had any title, it should have been proved,—that not having been proved, it could not be presumed,—and that the lands lying within the corporate limits of San Francisco, which had not, previously to the conquest of the country by the American forces, been granted by the Mexican Government or its officers, constituted a part of the public domain of the United States. This decision was founded upon the general doctrine, that a plaintiff in ejectment must prove title in those under whom he claims, in order to show title in himself, and that in the total defect of proof that the Mexican nation had parted with its right, the Court could not *presume* that state of facts; consequently the legal presumption was, that at the time of the military occupation of California by the Americans, the title to the soil still remained in the Mexican Government. In other words, all title being derived from the sovereign, no presumption could be indulged that the sovereign had parted with the title. If the fact existed, it must be proved. The Court say, (page 306) “It is claimed that San Francisco, as the lawful successor of Yerba Buena, was what is termed in Spanish law, a *pueblo*; and that being such, there was in some undefined manner, and under some vague system of things, vested in the people of the *pueblo*, or in the alcalde, or justice of the peace, or *ayuntamiento*, as representative of the *pobladores*, an absolute title to a large tract of land, the limits of which have never, as yet, been ascertained farther than the city surveyor has been directed to run the lines of city lots. Whence or how that title was acquired, was not attempted to be explained on the argument; and I am not aware of any legislation, general or special, of Spain or Mexico, which vested the *pueblo* of Yerba Buena, or the town or city of San Francisco, with a title to a foot of land within their assumed boundaries.”

The Court further say, (page 306-7,) “It does not appear that San Francisco, or Yerba Buena, was ever constituted a *pueblo*, or had the rights of one; a fact which, I think,

should be established by proof, and of which Courts cannot and ought not to take judicial notice; and further, even admitting that it was a pueblo, there is still nothing in the case showing the boundaries of the pueblo, or that the lot in controversy lies within those boundaries."

Since that decision was made, the extensive and minute examinations which have been made, have proved utterly unavailing to show, *either that any title was acquired by express grant from the sovereign, or that "any legislation, general or special, of Spain or Mexico, vested the pueblo of Yerba Buena or the town or city of San Francisco with the title to a foot of land within their assumed boundaries."* On the contrary, every additional fact which has been discovered, every additional document which has been brought to light—the elaborate and learned investigations which have since been made into Spanish and Mexican law—all have tended to establish the position then taken by the Court; until at last the proof of the correctness of that position has become so accumulated and clear, as no longer to leave any room for doubt in the minds of thinking and intelligent men, who have been at the trouble to inform themselves upon the subject, and who do not deem themselves forever committed to error, because they have once happened, inadvertently perhaps, to go astray.

§ 8. The decision in *Woodworth vs. Fulton*, was made at the December term, 1851. The doctrine of that case was re-affirmed in this Court in the subsequent cases of *Reynolds vs. West*, (1 Cal. Rep., 322, 325,) *Brown vs. O'Conner*, (id. 419, 421,) and in numerous other cases not reported, both in this Court and in the inferior Courts of the State during the years 1850, 1851, 1852 and 1853. The same view was again taken of the law in the case of *Vanderslyce vs. Hanks*, (3 Cal. Rep., 28, 45.) In this case, the defendant claimed under a grant from the *pueblo of San Jose*, which was the oldest *pueblo* in California, and the best known, and contained the greatest population; so that it would seem, if the extraordinary doctrine of presumption, which I am combatting, could be

properly applied in any case, it should have been applied to a claim arising under the pueblo of *San Jose*. But the Court say, (p. 45,) per Hydenfeldt, J., "I now come to the consideration of the defendant's title. He claims by virtue of a grant from an *Alcalde of San Jose*. The regularity of this grant is assailed on various grounds, but the view I have taken renders it unnecessary to consider them. *To sustain this grant, it was necessary in the first place that the lands in dispute had been the property of the town of San Jose. No title was exhibited establishing this fact, and the only evidence in relation to it was derived from reputation as to the boundaries of the town.*" The learned Judge then proceeds to state that, in as much as this evidence derived from reputation was insufficient, *the alcalde's grant cou'd not be sustained.* Several points are affirmed by the Court in the case last above cited.

First: That a pueblo and town are the same thing in Mexican law—for, the Court at one time designates *San Jose* as a pueblo, and at another, as a town.

Secondly: That where a party claims title under a Mexican pueblo or town, it is necessary to show "that the lands in dispute had been the property of the town; that is, the ownership of the town must be proved the same as the ownership of any other individual under whom a party claims title.

Thirdly: That where no proof is produced establishing ownership in the town or pueblo, *the Court cannot presume and decide, as matter of law, that the pueblo or town was the owner of the lands.*

Fourthly: In this case there is no presumption indulged, independent of proof, as to the limits of the town or pueblo, nor do we find the still more astounding doctrine that whatever lands a local officer might see fit to give away to any person, were to be *presumed, in law, to be included within the limits of the pueblo or town.*

Fifthly: We hear nothing of the doctrine that the grant of a lot in a pueblo, made by an *alcalde*, raises the

presumption that the alcalde had authority to make the grant. The novel doctrine of presumption afterwards advanced, does not seem at this time to have occurred to the minds of the Court, and, therefore, the positions taken are in accordance with law.

§ 9. But, again, in the case of *Leese & Vallejo vs. Clark*, (3 Cal. Rep., 17,) the Court holds a doctrine equally strict. In that case, the plaintiff claimed under a grant made by the Governor, of a water lot at the embarcadero of Yerba Buena, (being near the very centre of San Francisco). On the trial of the cause below, the plaintiff offered the original petition and grant executed in proper form, in evidence, but the Court below rejected the offer, whereupon a verdict and judgment were rendered in favor of the defendant. This Court, on appeal, affirmed the judgment. Mr. Ch. J. Murray delivering the opinion of the Court, says, (p. 25), after citing certain Mexican laws and regulations concerning the granting of lands, "I have cited these regulations to show that the alienation of the public domain of Mexico was a subject of careful consideration with that Government, hedged around with an infinity of restrictions for the protection of the sovereignty, and that the loose and careless conduct of her governors, in executing this trust, was not approved by the Supreme Government, although removal from the scene, and the insignificant value of the lands at that time, seemed to direct public attention from these abuses.

"To these regulations this Court can alone look, and by them every grant must be determined. Had we the power to discriminate, its exercise would be more dangerous, and productive of more injustice, than the total inability to go beyond them.

"If the officers of the Mexican Government, to whom was confided this trust, exceeded their authority or neglected the solemnities and formalities of the law, this Court is bound to take notice of it, and cannot shield those claiming under such titles from the necessary consequences of ignorance, carelessness, or arbitrary assumptions of power.

"The grant from Alvarado to Leese and Vallejo contains nothing but a petition and grant of the Governor. There is no map attached, no survey, record, or evidence, that the plaintiffs have ever been put in judicial possession, no act of the territorial deputation confirming the act of the Governor, or evidence that the grant, together with a map, were recorded in a book kept by law as a record of said grants, as provided in section 9th of the act of '28. But that these requisitions must be fully complied with, this Court has no doubt, without which a severance of the land from the public domain, and a rigid adherence in all other respects, the title did not pass to the grantees, but remained in the Government of Mexico.

"The title at best can only be considered as inchoate. It passed with the map of the property of Mexico to the United States, who now hold it, subject to the trust imposed by the treaty of cession and the equities of the grantees."

And again in the same case the Court uses the following language:

"Holding as we do that the law of '24, and the regulations of '28, must be strictly complied with, that the title of the plaintiffs at best is inchoate and incomplete, and therefore insufficient to maintain ejectment, we are of opinion the Court below properly excluded it as testimony."

§ 10. There are several things worthy of note in this case :

First: That, in granting lands in the city of San Francisco, the officer making the grant was obliged to follow strictly the laws and regulations which had been prescribed for that purpose by the Mexican Government, and *that any grant of a city lot, not made in strict conformity with the laws and regulations, would be held invalid.*

Secondly: That a party could not recover a lot in the city of San Francisco merely upon the strength of his *petition and a Mexican grant made in due form in pursuance thereof.*

Thirdly: That the land in controversy, although clearly situated within the limits of the then city of San Francisco,

and what the Court has since recognized as the former pueblo or town of San Francisco, constituted a part of the "*public domain*" of Mexico, and that without a rigid adherence to the Mexican laws and regulations the title did not pass to the grantee, but "*remained in the Government of Mexico*," and had afterwards "*passed with the map of the property of Mexico to the United States, who now hold it*, subject to the trust imposed by the treaty of cession and the equities of the grantees."

Fourthly: In this case, as in *Vanderslyce vs. Hanks*, we hear nothing of the subsequent doctrine of the Court that they would *presume, as matter of law, that there was a town—that any land granted was within the town—and that the officer had authority to grant—and that a simple grant, without any other evidence whatever, was sufficient to enable a party to recover in ejectment.*

§ 11. Thus we see that the principle of the case of *Woodworth vs. Fulton*, was sustained in this Court, and in all the inferior Courts during the years 1850, '51, '52 and '53, and was supposed to be the established doctrine of this Court. The business of the community, the buying, selling and mortgaging of lands, had proceeded upon the faith of that case—interests of great magnitude had grown up under it, and people considered it, and had a right to consider it, as the settled law of the State—and so in fact it remains, so far as any *decision* of this Court, based upon reasoning, is concerned. But, unfortunately for the community, unfortunately for the owners of real estate, and doubly unfortunately for the Court, so far as regards confidence in the stability of its decisions, and in a correct administration of law, a labored attempt was made by one of the judges of the Court, in an opinion delivered at the October term, 1853, to discredit the case of *Woodworth vs. Fulton*, and the ground upon which it was founded, and the conclusions therein arrived at—I refer, of course, to the opinion of Mr. Justice Heydenfeldt, in the case of *Cohas vs. Raisin*, (3 Cal. R., 443.) I speak of this emphatically as the *opinion* of Mr. Justice Heydenfeldt, for two reasons: first,

it is well known to the profession that Mr. Ch. J. Murray delivered an opinion in the case distinct from that of Mr. J. Heydenfeldt, and although it is not reported, it nowhere appears that the Ch. J. concurred in the reasoning of his associate, farther than the statement of the reporter, which would undoubtedly be sufficient to show the concurrence of the chief justice, were it not for the fact that a separate opinion was delivered by him. Secondly, the entire opinion of Mr. Justice Heydenfeldt is *extra judicial*, being wholly uncalled for by the facts of the case. It is not, therefore, entitled to be considered as authority—the case being one of that class, in which Courts are said to arrive at a correct conclusion upon erroneous reasoning, or upon no reasoning at all. Great consideration, undoubtedly, should be awarded to the opinion as emanating from so profound and experienced a jurist; but it is entitled only to the consideration due to its *reasoning*, and does not come to us with the authority of a decision of the Court. The facts in this case are as follows :

§ 12. The plaintiff, Cohas, whose title was derived under a grant made by an American Alcalde in 1847, executed a bond on the 12th day of December, 1850, to Legris & Laranchy, the condition of which was, that, upon the payment of certain promissory notes made by L. & L., amounting in the whole to the sum of \$3,000, the plaintiff would execute and deliver to L. & L. a warranty deed of part of lot 233, in the city of San Francisco ; and upon the nonpayment of either of said notes at maturity, Cohas was to have the right to take back the property. On the 1st day of March, 1851, Laranchy assigned his interest in the bond to Jules Raisin. At the date of the bond, the plaintiff, Cohas, was in the peaceful possession of the lot, which was delivered over in pursuance of the agreement, and the defendants had been, ever since the date of the bond, in peaceful possession, and had never been disturbed in any manner whatever, and, at the time of bringing the suit had a bakery on the lot in full operation. Fourteen hundred dollars of the purchase money had been paid, but three of the notes for \$300 each, which had become due on the

15th of June, July and August, had not been paid. Upon this state of facts the plaintiff brought his suit, and asked that the premises might be restored to him ; and this was all he did ask. It appears that Raisin, the assignee of the bond, was the only one who answered the complaint. The substance of his answer was, that he had discovered that the plaintiff had no title to the premises, and that the plaintiff could not comply with his covenant to execute a good warranty title, and he asked that the contract might be rescinded, and for judgment in his favor for the amount of the purchase money which had been paid.

§ 13. Now every lawyer must see, at a glance, that this is one of the plainest cases in the world in favor of what the plaintiff demanded, and against what the defendant, Raisin, asked. *The defendants had obtained possession of the lot from and under the plaintiff*, and then neglected to perform their part of the very contract *under which they had entered into possession*.— Whether the plaintiff had title or not, was immaterial, for the defendants had obtained possession from him, and still held possession under him, and, therefore, they could not dispute or question his title; and, besides, the plaintiff had only covenanted that he would execute a good warranty deed, and, whether he had title or not he could, unquestionably, execute a good warranty deed, upon the covenant of warranty, in which the defendants, if ever evicted, could have maintained their action. For, that there is no breach of warranty until there is an actual eviction, and that the covenant that the plaintiff will execute a good warranty title refers to the deed itself, and not to the title to the property, are rudiments in law. (See 4 Kent's Comm., 471, and 20 Johns., 129.)

§ 14. The case then was simply this: *the defendants having procured possession from the plaintiff, they were estopped, so long as they retained such possession, from questioning the title of the plaintiff*.

§ 15. The facts of the case bring it within that class of cases of which *Hoen vs. Simmons*, (1 Cal. Rep. 119,) *Tartar vs. Hall*, (3 id. 263,) and *Redman vs. Bellany*, (4 id. 247,) are examples.

§ 16. In *Hoen vs. Simmons*, the defendants claimed that the plaintiff had sold them the premises in question, and that they had taken possession on the faith of such contract ; but they had neither fulfilled nor offered to fulfill the terms of the contract which they set up. In a suit brought by the plaintiff to recover the premises, the defendants relied, in bar of a recovery, on want of title in the plaintiff. But the Court say, "The defendants having entered into possession, claiming under the plaintiff and in subordination to his title, are estopped from questioning it."

§ 17. In *Tartar vs. Hall*, the plaintiff executed and delivered a conveyance to the defendant of 160 acres of land, belonging to the United States, and delivered possession thereof to the defendant, and the latter gave his note and executed to the plaintiff a mortgage upon the same land. In a suit brought by the vendor and mortgagee, to enforce payment of the note and mortgage, the defendant set up that the plaintiff had no right, title, estate or interest in the premises, and had no power or authority to convey the same.

§ 18. But the Court, per Heydenfeldt, J., say, (p. 266,) "The mortgage executed by the defendant operates an estoppel to the defence he has set up, according to well established principles of public policy, for the security of good faith and fair dealing, a party is not allowed to controvert the declarations which he has made by deed, or to deny the enforcement of rights which he has thus attempted to confer.

§ 19. In *Redman vs. Bellamy*, the defendant had executed a mortgage upon premises of which he claimed to be the owner. Having availed himself of the consideration for which he executed the mortgage, he set up, as a defense to an action of ejectment, brought by the purchaser, under a judgment in a suit of foreclosure, that he was not the owner, but that the title was in another person. But the Court, per Heydenfeldt, J. say, (p. 250.) "The plaintiff claims under a Sheriff's sale. The execution was upon a decree of foreclosure of a mortgage executed and given by the defendant. He is, therefore, estopped from setting up the defenses attempted in this case."

And the Court cite the above case of *Tartar vs. Hall*, as an authority in point.

§ 20. These cases proceed upon the principle, that a person shall not be permitted to enjoy a right, and at the same time controvert or deny the validity of the title under which that right is enjoyed, and thus avoid the obligation which he has incurred. And the same principle is applied to the case of *Cohas vs. Raisin*—and it is the only principle, either of law or of ethics, which is applicable to the facts upon which the Court was called upon to pass judgment. Indeed, the case of *Hoen vs. Simmons* was cited by counsel, but the learned judge, preferring originality to law, leaves the real merits of the case to themselves, and launches forth into a disquisition, which would have prefaced almost any other judgment of the Court, as well as the one at bar. And I will add further, that I have the best authority for asserting, that neither of the ingenious and learned counsel who argued the cause, raised or suggested the point upon which the opinion is based.

§ 21. But, ~~where~~ the opinion in *Cohas vs. Raisin* is to be taken as the decision of the Court or not, if it be in all respects erroneous, if it mistakes facts and misapprehends authorities, if, in fine, it be found to be one series of blunders from beginning to end—then, surely, it ought not, in any view, to be regarded as authority.

§ 22. I shall now show that, that opinion is illogical in reasoning—unsustained by the authorities cited—exposed to the imputation of unfair construction of prior decisions of this Court—mistaken in the facts of the very case then under consideration, as well as in its apprehension of Spanish and Mexican law—resting for support upon presumption deduced from presumption *in infinitum*—erroneous in its application of the principles of the common law—and founded solely upon the assumption and decision by the Court, as matter of law, of a point which is clearly a question of fact, and determinable as such by a jury.

§ 23. The opinion sets out with the statement, “that the plaintiff sued on a note which was given for part of the pur-

chase money of a lot"—Thus, the opinion commences in mistake, and the first line perpetrates an error. The plaintiff did not sue upon a note. He brought his action to recover back the lot, upon that portion of the agreement, which entitled him to restitution, in case either of the notes was unpaid at maturity—The only prayer of the plaintiff, as appears from the report of the case, (p. 444,) was, that the property might be restored to him, or to use his language as reported "might be *restituted* to him." Not only this, but it appears further, that Jules Raisin was the only defendant who appeared and answered the complaint, so that the litigation was, in reality, between the plaintiff and himself. But Jules Raisin was the assignee of the bond given by the plaintiff, and was in no respect a party to, or liable upon, the notes, or either of them, and could not, by any possibility, be sued upon them. How, then, could the Court start off with the assertion that "the plaintiff sued on a note," &c? And what can be expected from the balance of an opinion which perpetrates such a blunder at the start?

§ 24. The opinion, then, in the next line, goes on to say, "The sale of the lot was by warranty." Thus, the second line contains the second mistake. There had been no sale, either by warranty or otherwise. There was a contract to sell, and to give a warranty deed, at a future time, upon the happening of a future contingency, the payment of the notes. That, however, is a very different thing from "a sale by warranty," which the opinion asserts it to be. Thus, in the first two lines of the opinion, there are found as many mistakes of fact; and how can an opinion be regarded as authority, which is founded upon an entire misapprehension of the facts of the case?

§ 25. The opinion then proceeds, "The defendants set up that the plaintiff has no title, and therefore cannot comply with his warranty, and they pray a rescission of the contract." Now, every *lawyer* will see, at a glance, that this defense is no legal or equitable answer to the complaint or bar to the action, and that, if judgment final had been rend-

ered in favor of the defendants on this ground, it would have been bad, and would have been stayed on motion in arrest. The point of law on which the merits of the case turned, was, as has been shown above, very different from that set up in the answer, and on which the opinion is based.

§ 26. Then, solely upon the admission in the record that the plaintiff derives title from the grant of an American alcalde, which was made during the war between Mexico and the United States—a fact, which, in any proper legal view, was entirely irrelevant and immaterial, inasmuch as the same judgment ought to follow, whether he derived his title from an American alcalde, or from a Mexican alcalde, or from the Mexican or American government, or from any other source—the opinion proceeds to the statement of the following proposition: “This involves the consideration, whether, under the Mexican domination, towns were invested with property in lands, whether alcaldes of towns had power to grant, and if so, whether the qualifications of the officer, and the circumstances of the country at the time of the grant, will affect its validity.”

§ 27. But, *the facts of the case* did not involve the consideration of any, or either of, the matters thus stated to be involved. And this admission of the parties, that the plaintiff claimed under an American alcalde, upon which this statement in the opinion proceeds, has been shown to be wholly immaterial.

§ 28. “The laws of Spain fully recognize the right of cities, towns, and villages, to acquire and dispose of real estate, subject to the royal regulations, which were made from time to time for their government.”

Undoubtedly, the laws of Spain, like the laws of all civilized communities, recognized the right of cities, towns and villages, as well as of individuals, to acquire and dispose of real estate, subject to the royal regulations, or, which is the same thing, subject to the laws. But what has this to do with the matter in hand? even conceding that matter to be the immaterial proposition which the opinion has just above

announced as being involved in the case. Because cities, towns and villages *had the right to acquire*, does that prove that they *did acquire* in all cases? Does that prove that the town of San Francisco *had acquired*? And because they could “dispose of,” *according to law*, does that prove that they could “dispose of,” *without law, or contrary to law*?

§ 29. “And,” proceeds the opinion, “when once acquired, neither the king, nor his officers, can take away, or grant to others, any of those municipal lands.” What municipal lands? for, this is the first place, in which any thing is said about municipal lands. The opinion, assuming to be learned in logic as well as in law, should hardly have stated, that neither the king nor his officers could take away or grant “municipal lands,” because towns, cities and villages, had the right to acquire and dispose of, and had acquired “real estate.” This proposition assumes the very point which is to be proved—that is, that the lands *had been acquired* by the town of San Francisco; for, we deny that the town of San Francisco ever *did acquire* any lands. It will be shown, hereafter, that this sentence is not only bad in logic, but, what is equally, perhaps more important, assumes a position which is incorrect in law.

§ 30. The opinion then proceeds with the following quotation from Spanish law: “Our will and pleasure is that cities, towns and villages shall retain their rights and revenues, and municipal lands (*propios*), and that no grants be made of them, and we command that all grants of the same or any part thereof which we make to any person, be of no value whatever.”

§ 31. I would, in all seriousness, ask, what support for the doctrine sought to be sustained, can be derived from this law? In order to be of any avail to the opinion, the reasoning must be this: It is the will and pleasure of the king, that cities, towns and villages shall *retain* their rights, revenues and municipal lands—therefore they have a right to part with them—but, says the king, it is our further will and pleasure, that no grants be made of such lands—therefore, a grant of

such lands by an American alcalde is good. Again, says the king, we command that all grants of the same or any part thereof, which we may make to any person, be of no value whatever—consequently, says the opinion, because grants by the king are void, grants by an American alcalde are valid.

§ 32. I might proceed with the rest of the paragraph in the same way, showing an unmeaning citation of authorities, upon points which were never doubted or disputed, or false deductions from such authorities, if they can be considered as having any applicability at all.

The law cited in the last quotation of the opinion, as Law I, Tit. XVI, Lib. VII, of Nov. Rec., which is the same as Law, 2 Tit. 5, Lib. 7, R., has been as often misunderstood and perverted, as it has been cited in our Courts. The law when correctly translated, is as follows ;

“Our will and pleasure is to preserve to our cities, *villas* and *lugares*, their rights, revenues and *propios*, and not to make any grant of any thing thereof: Wherefore we command that the grant or grants, of them or any part thereof, which we may make to any person whatever, be not valid.”

This law speaks of such things only *as have been already acquired* by cities, villas and lugares, but it confers no new property or rights upon the places spoken of. So, also, when the law guaranties to the towns their privileges, offices, uses, customs and franchises, (as in Laws 1, 2, 3, 4 and 5, Tit. 2, Lib. 7, Rec.; and Law 3, Tit. 5, Lib. 3, Rec.), or rights, revenues and *propios* as in Laws 1 and 2, Tit. 5, Lib. 7, Rec., (the first being the law quoted in the opinion), or *Aldeas*, fortresses, &c., (as in Law 6, Tit. 5, Lib. 7, Rec.), it speaks of those things which have been expressly granted to them, or acquired by some legitimate title, and is only in affirmance of the principles of natural justice equally applicable to the rights of individuals and of corporations; and when it gives a solemn pledge to preserve to the towns and cities in Spain, their *terminos comunes*, or *valdios ejidos*, *montes* and *pastos*, (as in Laws 1 and 2, Tit. 7, Lib. 7, Rec.), and that the sovereign will not sell any part of the *terminos publicos*, or *valdios*,

(as in Laws 8 and 10, Tit. 5, Lib. 7, and in Law 11 of same Title, which refers to the solemn contract between the king and the people known as the "*Condicion de Millones*"), it has exclusive reference to vacant lands in Spain, of which the citizens of the towns had enjoyed the use in common for many centuries, and proposes the perpetuation of a system of policy in reference to the public lands which was completely abandoned in 1813.

§ 33. These laws, with others of a like nature, so frequently cited in our Courts, recognizing certain rights, privileges, exemptions and property in towns, refer to such rights, &c., as had been conferred by special and formal acts of the legislative power, and prove this, and this only, that the sacred right of property, founded in the law of nature itself, was respected by the sovereign, whether vested in individuals or corporations. But to cite these laws for the purpose of establishing the fact that a town is the owner of any specified or defined tract of land, store, apothecary's shop, rural estate, or other property, would be no less absurd, than to cite in support of some private individual land claim, Law 7, Tit. 13, Lib. 4, and Law 6 and 10, Tit. 10, Lib. 5, of the same *Recopilacion*, to establish the fact that the claimant had acquired a valid title to the property claimed by him, because these laws contain guaranties equally ample in favor of the private property of individuals. For all the rights or property which individuals, towns or corporations had acquired, must appear in the documents by which they were acquired, or in the general guaranties of the common law of Spain extending alike to individuals, towns, villas, cities and corporations.

§ 34. But again, "The manner of granting municipal lands to towns, and the manner in which they were allowed to rent or dispose of them, depended on royal regulations which were changed from time to time. At one period they could grant or sell them, and at another, they could only lease them, either for a term of years or forever, the rents forming a fund for municipal expenses. But these grants, sales and

leases were always made by the municipal authorities, with the permission of the crown, but neither the king nor the crown officers could themselves dispose of the lands once granted or acquired by the towns." Now, if this statement has any applicability at all, it tends to overthrow the very doctrine in support of which it is cited. There is no doubt but the manner of granting lands to towns, and the manner in which they were allowed to rent or dispose of them, depended on regulations of the king, or of the legislative power. But it is absurd to cite any such doctrine for the purpose of establishing the fact *that a grant of lands had been actually made to San Francisco* : or, if such grant had been made, that an alcalde had the power to dispose of lands thus granted, *in violation of regulations* of the king or legislative power. Further, does the opinion intend to have us infer, because towns were at one time authorized to grant or sell lands, and at another time to lease them, that an American alcalde of 1847, had power to make an absolute gift of any quantity of lands to any person he deemed proper? It so, I answer, that is clearly a *non sequitur*. The most singular part of this last quotation is yet to come. These grants, sales and leases, it says, were always made by the municipal authorities, with the *permission of the crown*—consequently, the reasoning must be, a grant made *without such permission*, will be upheld as valid; for it will not be pretended, that any permission to alienate was given to an American alcalde, by the sovereign power either of Mexico or of the United States.

§ 35. To proceed—"In forming new towns, the viceroys were directed, not only to mark out to them common lands, but also to give municipal lands (*propios*) to those who had none, the proceeds of which will serve to pay the *corregidores*." But, is it to be inferred, because viceroys were directed to give municipal lands to new towns, that, therefore, a viceroy, or anybody else, had given municipal lands to San Francisco? That would be a strange process of reasoning; yet, this would seem to be the only inference intended

to be drawn, or which can be drawn from this statement. There is, however, another difficulty which occurs, before any such inference can be deduced from the authority cited—and that is, the Spanish word “*propios*” happens to be incorrectly translated “*municipal lands*.” The term has a much broader signification.

“In some of these orders and decrees the municipal authorities were allowed to alienate the municipal domains only in case such measures were necessary for the good of the towns.” In what orders or decrees? No order or decree has been mentioned before. Would the opinion have us infer, because the municipal authorities of some towns, were, by express order or decree, authorized to alienate municipal lands, in case such alienation was for the good of the town, that, therefore, the municipal authorities of *San Francisco* might, *without any order or decree*, alienate the lands of *San Francisco*, not only where it was *not necessary for the good of the town*, but where it was *highly prejudicial to its interests*.

“In others they were forbidden to sell, and directed to lease only.”

Therefore, without any directions either to sell or to lease, the *alcalde* had the power to sell.

§ 36. I have now gone through that portion of the argument from which the two conclusions are drawn :

First : That the pueblo, town, village or city of *San Francisco*, owned all the lands which an *alcalde* might choose to grant ; and

Secondly : That the municipal authorities of *San Francisco* had power and authority to alienate any lands which they might choose to claim belonged to the city, village, town, or pueblo ; for, I have been unable to find anything in any other portion of the opinion, which can be claimed as even tending to show ownership in the pueblo, or authority to convey.

I leave it with the Court to say, with how much propriety, such conclusions can be drawn from such premises.

§ 37. After stating that, on the founding of new towns in

California, the population being too small to authorize ayuntamientos, the granting of town lots was confided to the governors, the commandants, and to the captains of the presidios; that in 1812 and 1813, the Cortes authorized the establishment of ayuntamientos in towns which had not before that right, and authorized the *propios* as well as royal lands to be reduced to private ownership—and that the grant of lots in pueblos, was to be made in full property by the ayuntamientos—and that other laws fixed the organization of the ayuntamientos, of which the alcalde was the presiding and executive officer—propositions which will be fully considered in a subsequent portion of this argument—the opinion proceeds as follows: “In the Colonization Law of 1824, it is expressly stated that the objects of this law, are the lands of the nation, which are not private property, nor belong to any corporation or pueblo, and can therefore be colonized; thus fully recognizing the right of ownership in the pueblos, to the land acquired by them, either by grant or purchase.”

§ 38. “Thus fully recognizing the right of ownership in the pueblos, to the land *acquired* by them either *by grant* or *purchase*.” But who in the world ever doubted the right of pueblos to own land *acquired by them, by grant or purchase*, or by any other legal mode? No one ever doubted or questioned their capacity to hold lands. But the *right* of ownership, and the *fact* of ownership—the *capacity* to hold, and the *fact* of holding, are different things. Whereas, the opinion proceeds upon the supposition that the *right* of ownership cannot exist without the *fact* of ownership. Every individual has the *right* to own lands, but a man would not be commended for his reasoning, who should deduce therefrom that every individual *did own* lands. “Of such stuff are dreams made.”

§ 39. “On the 6th of August, 1834, the Territorial Depu-
tation of California authorized ayuntamientos of towns to
apply for (*egidos*) common lands, and (*propios*) municipal
lands, to be assigned to each pueblo.”

“Authorized ayuntamientos to apply for,” &c. But how does that help the argument? Does it necessarily follow,

because ayuntamientos had the *authority to apply*, that they *did apply*? And further, that their *application was granted*, and was followed up by an *actual assignment of the lands*? by actually marking them out, and specifically dedicating them for each particular purpose—some for *proprios*, others for *ejidos*, others for *dehesas*, &c., in the manner in which the law required these things to be done? Every individual was authorized to *apply for a grant* of lands to the government; but every person did *not apply*, and not every person, who *did apply*, was successful in his application.

§ 40. Art. 2nd: The lands assigned to each pueblo for municipal lands, (*proprios*.) shall be subdivided into middling sized and small portions, and may be rented out or given at public auction, subject to an emphyteutic rent, or ground tax, &c."

"The lands *assigned* to each pueblo" &c., not the lands, which each or any pueblo *may apply to have assigned* to them, but such as shall *have been actually assigned*; and how can this citation of the law help the cause, until it appear that such assignment *has been made*! Further, the authority contained in this clause is to rent or give at *public auction*, subject to an emphyteutic *rent or ground tax*. It is scarcely necessary to suggest that, when an authority like this is given by law, it must be strictly followed, or the act done is a nullity. And, how can this authority be made to sanction *an absolute gift or grant, not made at public auction*, nor with the *usurpation of any rent or ground tax*? Yet the opinion goes the full length of upholding an absolute grant, not made at auction, and without the reservation of rent.

§ 41. "By the law of August 9th, 1834, art. 5th, municipal lands were to be granted to the new pueblos formed out of the secularized mission."

"Were to be granted," &c.—But *were they granted*? The question is not so much what *might* be as what *was*.

§ 42. "On the the 3d of November, 1834, the Territorial Deputation of California, decreed that the Governor should direct the election of an ayuntamiento in the partido of San

Francisco to be composed of one alcalde, two regidores, and one ~~surdico~~. This ayuntamiento was directed to ~~make out~~ in the shortest time, the boundaries or limits of its municipality.

The ayuntamiento was elected in December, 1834, "as shown by the records."

Yes—an ayuntamiento was elected for the *partido* of San Francisco, pursuant to the resolution of the Territorial Deputation, passed November 3d, 1834, and such resolution was communicated to General Vallejo by Governor Figueroa, in a letter dated November 4th, of the same year, and such election was held, not in what has since been so emphatically upheld as "the *pueblo of San Francisco*," but at the Presidio. The ayuntamiento was installed by the military commandant of the Presidio, who had, down to that time, exercised the civil functions, with which the newly constituted body was to be charged. But the opinion forbears to tell us what were the *territorial limits of the partido*, or, to adopt the later and more popular term *pueblo*, for which this ayuntamiento was elected, and over which its jurisdiction extended. This *partido* of San Francisco was by no means limited to those "*four miles square*," or "*four square miles*," which have occupied so large a space in the fancy of a late generation. It comprehended, not only that small patch, but a large extent of country on the eastern side of the bay of San Francisco, now designated as Contra Costa, and on this side of the bay the whole of the peninsula, as far as San Francisquito Creek, and on the north the whole or the principal part of the present counties of Marin and Sonoma.

§ 43. When the election was held pursuant to that order of the Territorial Deputation, the whole *pueblo*, that is, *people of the partido of San Francisco*, came from their respective abodes in Contra Costa, Sonoma, San Rafael, and from the ranchos between here and San Francisquito Creek, "sparing no exertion to do so, as they were anxious to get rid of the military authority." Not only did the voters for the ayuntamiento come from Contra Costa and the other places above

named, but a majority of the individuals chosen for electors, and of those elected to fill the various offices, at different periods, resided either on the other side of the bay, or in the mission of San Francisco, or on some of the ranchos, distant from the Presidio and port; and, in 1835, twenty-seven persons, residing in Contra Costa, made an effort to be set apart from the partido of San Francisco, on account of the inconveniences to them of serving on the ayuntamiento, which, at that date, was required to hold its sessions at the Presidio. The sessions continued to be held at the Presidio until some time in the year 1837, when they were removed to the Mission, which, from that period to the war, was the residence of the local authorities, and the place where all elections were held. It would seem from the above, that if there be any particular portion of that large extent of country, known as the partido of San Francisco, which would be entitled to the rights, privileges, and property, which are supposed by some, not well acquainted with the subject, to be vested in a corporate being, which they have christened pueblo, it would, most naturally, be supposed to be either the Mission or the Presidio; and no better legal reason can be given for locating that particular spot at the embarcadero of San Francisco, than could be given for locating it at the embarcadero of Contra Costa, or of Sonoma, or of San Rafael, or of San Francisquito Creek.

If an alcalde's grant be good, of a lot of land within the present limits of the city of San Francisco, upon the ground of the existence of an ayuntamiento for the partido of San Francisco, it must be equally good of a lot in any other portion of the territory within the jurisdiction of the ayuntamiento. But what would be said of a grant by an alcalde of San Francisco of a lot of land in Sonoma or Marin county? Yet the validity of such a grant is a necessary deduction from the doctrine of this opinion in *Cohas vs. Raisin*.

The truth of the matter, however, is, that this action of the Territorial Deputation, the election of the ayuntamiento, and all the subsequent actions of that body, had nothing to do

with the municipal organization of any town, but was a temporary organization for the entire northern portion of the territory.

§ 44. Further, at the date of this proceeding of the Territorial Deputation, the power of establishing pueblos or towns did not rest with the deputation; it could only be exercised by the supreme Government. The deputation could merely take the initiation, and then recommendation was to be transmitted through the proper authorities to the Supreme Government for its final action.

But further, the proceedings of the Territorial Deputation do not purport to direct the establishment or organization of a pueblo or town, or villa, or city, or any other municipal body—it simply directs that the partido, or district of San Francisco—thus speaking of something already existing—proceed to the election of a constitutional ayuntamiento, to be established in the presidio of that name.

§ 45. Above all, the proceedings of the Territorial Deputation and the action had in pursuance thereof, were, at the utmost, but the organization of a political body, charged with the government of a limited district of country, and were in no wise connected with, or followed by, a change in the property to a single foot of land. The opinion proceeds upon the assumption that a political organization cannot exist under the Spanish system, without being, by the bare fact of its organization, vested with the absolute title to all the land within the limits of its jurisdiction. Is it necessary to suggest a doubt, whether this can be law?

§ 46. But, further, neither in the decree of the Territorial Deputation, nor in the order of Governor Figueroa, in conformity therewith, is any ~~diction~~ contained to the ayuntamiento or any other body, "to mark out, in the shortest time," or in any time, "the boundaries and limits of its municipality," or any boundaries, or any limits. The ayuntamiento was elected for the partido or district of San Francisco, a district of country, the extent and boundaries of which were supposed to be known, and required no marking out by the ayuntamiento.

The original decree and the whole thereof is as follows :
 “ 1st. That the political chief direct the district (partido) of San Francisco to proceed to the election of a constitutional ayuntamiento, to be established in the presidio of that name, to be composed of one alcalde, two aldermen, (regidores,) and one town-attorney, (syndico procurador,) conforming, for that purpose, in all respects to the constitution and the laws of the 18th (12th) of July, 1830. 2d. That report be made through the proper channel to the Supreme Government for an approval.”

And the original order of Figueroa is as follows :

“SEAL OF THE POLITICAL GOVERNMENT }
 OF UPPER CALIFORNIA. }

“The most excellent Territorial Department using the powers conferred on it by the law of the 23d June, 1813, on yesterday passed the following instruction :

[Here follow the resolutions of the department, as copied above.]

“ And I transcribe it to you for your information and compliance, recommending that the election be carried into effect on the day appointed by said law of the 12th of June. I also notify you, that the ayuntamiento, when installed, will exercise the political functions with which you have been charged, and the alcalde the judicial functions, which the laws, for a want of a judge of letters, confer upon him, you remaining restricted to the military command alone and receiving in anticipation the thanks due for the prudence and exactness with which you have carried on the political government of that demarcation. God and Liberty.

“ November 4th, 1834.

“ JOSE FIGUEROA.

“ To the Military Commandant of San Francisco.”

§ 47. In what manner this direction, concerning the demarcation of boundaries of a municipality, came to be inserted in Wheeler's Land Titles, I am at a loss to conceive. It is certain, that this clause is not contained in the original, either of the decree, or of the order ; and it is equally certain, that the learned judge, although he refers to these documents, the decree as of record in the Surveyor-General's office, and

the original order of the Governor as on file among the alcalde's records, must have rested satisfied with the authority of Wheeler's Land Titles, which he quotes, without examining the originals.

§ 48. But, suppose such direction was contained in the decree, or order, or both of them, and, moreover, suppose the ayuntamiento did mark out the boundaries, what then? Does it result from that, that the partido, pueblo, district or town, became the *owner of any of the land* within, or without, the boundaries thus designated? No law has ever been produced sanctioning such a supposition, no authority has been cited, nor can be—none such exists.

§ 49. I cannot illustrate the position which I maintain, better than by quoting from the decision of Governor Felch, in the case of the city claim.

"The establishment of the pueblo is based on the action of the Territorial Deputation had at their session the 3d of November, 1834. At that time the ultimate power of establishing pueblos or towns as municipal organizations, was with the supreme government. The Territorial Deputation was to take the initiative, their recommendation and action was to be transmitted through the political chief to the supreme government for the disposition of the latter. It is not alleged that any action of the supreme power was had in the case under consideration, but the proceedings of the Territorial Deputation are claimed to have had the effect of creating such organization. I shall not stop to enquire whether without the approbation of the supreme government any action of that body could have that effect, but conceding that it could, these proceedings were not ~~as~~ such, in my opinion, to prove the establishment of an organized pueblo within the limits defined in the decree of confirmation.

"The proof of the establishment of the pueblo consists chiefly, if not exclusively, of the record of the proceedings of the Territorial Deputation on the 3d November, 1834. The dispatch of Governor Figueroa, of the next day, designated as exhibit No. 1, annexed to the deposition of M. G. Vallejo,

and the document marked Exhibit No. 18, known as the Lamorano document. All these are recited in the opinion of the majority of the commission filed in the case.

"From the examination of these documents I am of the opinion that the organization which took place at the Presidio in the fall of 1834, under the action of the Territorial Deputation of November 3d, was a temporary organization for the government of the entire northern portion of the territory, and not the establishment of a municipal organization of a town within the limits described in the decree of confirmation. I do not esteem it necessary here to go into a protracted argument on this subject, but the following, among other considerations tending to corroborate the view, may be stated :

"1. The record of the proceedings of the Territorial Deputation, which is the basis of the organization, whatever was its character, does not establish or direct the establishment of a pueblo or town, but simply directs that the partido (district) of San Francisco proceed to the election of a constitutional ayuntamiento to be established in the presidio of that name, &c.

"2. The ayuntamiento so to be established, was by the order of the Governor Figueroa, transmitting a copy of these proceedings, with direction to proceed to the election of the proper officers directly stated to be not the exercise of merely municipal jurisdiction, but of political functions, and thus not merely within the area now claimed to have been embraced in the pueblo, but over the whole northern portion of California, where Gen. Vallejo, the commandant of the Presidio, had previously exercised this authority.

"3. The testimony of the witnesses shows that in fact the ayuntamiento did exercise its authority not merely over this limited space, but over a tract of country extending many miles south of the present city of San Francisco, and embracing a large tract of country on the opposite side of the bay, and almost an indefinite extent to the north of it.

"It is argued that the existence of an *ayuntamiento* necessarily implies the municipal organization of a town over

which it presides. In the original use of the word in ancient Spain, it is probably true that *ayuntamientos* existed only in such *pueblos*, or towns. But the constitution of 1812 was the commencement of important changes in the internal economy of Spain and her provinces, and under this and the subsequent laws of 1812 and 1813, and more especially under the Mexican law of 1830, the character of these organizations in Mexico was greatly modified. However, it might have been before, the powers and jurisdiction of an *ayuntamiento* might certainly, under these, embrace a large extent of country, and include within their limits many parishes and *pueblos*. Their defined duties and powers were such as pertained, at least many of them, to the supervision of rural districts, as well as to towns or cities. We know, moreover, that the northern portions of California, with its sparse population, was generally governed by officers or *tribunals*, whose duties and powers were anomalous in their character, and enlarged to meet the exigencies of the country. Thus, down to the time of the organization of the *ayuntamiento*, Gen. Vallejo, the military commandant of the Presidio, exercised full civil authority over that immense region of country. And thus Gen. Sutter, at a subsequent period, acted as judge of the entire Sacramento district, with powers understood to be ample, but which were both extraordinary and undefined. We should not be surprised, therefore, if it should appear that the new organization made to provide for an emergency, should be found to impose on the newly established tribunal, a different or more enlarged jurisdiction than usually appertained to tribunals elsewhere bearing the same name.

“The evidence shows that at the time the *ayuntamiento* was established there was no considerable settlement, or town within the limits specified to require a municipal organization and with the exception of the military forces stationed at the Presidio, there were very few inhabitants established there. The first house was not built at Yerba Buena until after this period, nor is it shown that any effort was made subsequently to build up a town, having for its centre the

plaza of the Presidio, with its streets radiating therefrom in the usual manner of constructing Spanish or Mexican towns."

§50. And again Mr. Commissioner Felch says in another place, the dispatch is presented as evidence of two facts :

"First, that the organization of the ayuntamiento was the establishment of a municipal corporation or pueblo, and secondly, that the lines designated therein and previously recommended by Gen. Vallejo were adopted by the deputation as the boundary lines of the pueblo.

"Gov. Figueroa had not the power to establish a pueblo or to fix the boundaries thereof or to make an assignment of lands for its public uses. His decree to that effect would be of no authority. The deputation alone had the power to take the initiation in this subject."

51. "And it must be *presumed*" continues the opinion, "that the ayuntamiento did its duty in marking out boundaries as directed, especially as they immediately commenced making grants of the lands." 5 Cranch, 242; 3 Wheat. 594; 3 Peters, 320.

§52. The foundation of this beautiful superstructure, raised by presumption, is overthrown by the consideration, that no direction was given to mark out boundaries, as the opinion erroneously supposes. This has already been shown. But if it were otherwise, this doctrine of presumption does not apply, and the authorities cited do not sustain it. The first case cited in the opinion is *Taylor vs. Brown*, (5 Cranch, 234, 242.) The complainants claimed through a younger land warrant and patent, but older survey, under the land laws of Virginia. The defendants held the elder warrant and patent, but the younger survey. The counsel for the defendants contended that it did not appear that the warrant for the survey under which the complainants claimed, ever was in the hands of the surveyor, and that without his holding such warrant, his survey was invalid. On the other side, it was said not to be necessary that the warrant should have been in the hands of the surveyor. But, if it were necessary that he should have had it in his hands, the presumption arising

from his having made the survey, was strong that he had the warrant, and was sufficient proof of that fact, until the contrary were proved. Chief J. Marshall, in noticing this objection says: (p. 241, 242,) "It is said that the warrant was not in possession of the principal surveyor when the survey was made."

"The answer given to this objection is conclusive. The warrant is an authority to, and an injunction on, the surveyor to lay off 2,000 acres of vacant land which had not been surveyed by order of council and patented subsequent to the proclamation. Whether acts under this authority are valid or void, if the authority itself be not in possession of the officer is perfectly unimportant in this cause; because the court considers the certificate of the surveyor as sufficient evidence that the warrant was in his possession, if in point of law it was necessary, that it should be lodged in the office. That certificate is in the usual form, and states the survey to have been made by virtue of the governor's warrant and agreeably to his majesty's royal proclamation." It will be seen at once that this case is no authority to sustain the position for which it is cited. If it were asked to presume that the ayuntamiento held the order of Gov. Figueroa—supposing such order to have directed what is asserted—from the fact proved to exist, that the ayuntamiento had actually marked out the boundaries, the case of *Taylor vs. Brown* would have been an authority—but it is no authority whatever to show that it may be presumed that an officer, or political body, did its duty because directed to do it. Does anybody suppose the doctrine of presumption is carried so far, that the Court, in *Taylor vs. Brown*, would have presumed that the surveyor had made the survey, from the fact of a warrant having been issued to him directing him to make it? Yet, the facts in the case must be thus transposed before it can be an authority upon the point cited.

§ 53. The next case cited in support of this doctrine of presumption, is *Craig vs. Radford*, (3 Wheat., 5 94.) The presumption in this case, as in *Taylor vs. Brown*, was of the

warrant being in the hands of the surveyor, from the fact of the survey—the facts being the same as in *Taylor vs. Brown*, and arising under the same law, and the decision of the Court being based upon that case.

§ 54. The next and last case cited, is that of *Stringer vs. Lessee of Young*, (3 Pct., 320.) This case neither decides nor treats of the doctrine of presumption, in any respect; and is no authority either way, upon the point under discussion, unless a bare reference, in the decision of the Court, to the case of *Taylor vs. Brown* in support of another point, be deemed authority in support of this doctrine of presumption.

§ 55. How much more in accordance with law are the remarks of the Ch. J. in *Leese and Vallejo vs. Clark*, (3 Cal. R., 25, 26,) speaking of the regulations of the supreme government of Nov. 21, 1828, he says, “To these regulations this Court can alone look, and by them every grant must be determined. Had we the power to discriminate, its exercise would be more dangerous and productive of more injustice than the total inability to go beyond them.”

“If the officers of the Mexican Government, to whom was confided this trust, exceeded their authority or neglected the solemnities and formalities of the law, this Court is bound to take notice of it, and can not shield those claiming under such titles from the necessary consequences of ignorance, carelessness, or arbitrary assumption of power.”

§ 56. And again, “But that these requisitions must be fully complied with, this Court has no doubt, without which a severance of the land from the public domain, and a rigid adherence in all other respects, the title did not pass to the grantees, but remained in the government of Mexico.”

§ 57. But, upon principle, who ever heard of a party being presumed to have done an act barely because he was required or directed to do it? A party is required to prove that he has done the act which the law, or his superior authority has directed him to do, when the doing of that act is necessary to sustain some right which is claimed. The law would hardly be guilty of doing so foolish a thing, as to direct an

act to be done, and then presume that it had been done, from the fact, of its having directed it.

§ 58. But, it seems that this presumption may be indulged in, "especially as they (the ayuntamiento,) immediately commenced making grants of the lands." The ayuntamiento was elected in December, 1834. The first grant of land, other than by special order of the government, was made in 1839. Thus, four or five years, at least, intervened between the election of the ayuntamiento and the making of the first grant. I am not so much astonished at the fancy which can indulge in such a presumption, as to the ownership of land, when I find that it has the faculty of condensing four or five years into "immediately."

The reason for my asserting that the first grant was made in 1839, is as follows: It appears by the certificate of Washington A. Bartlett, who then filled the office of alcalde, by appointment from Captain Montgomery, dated August, 1846, that he "applied to Don Jose de Jesus Noe, the alcalde of said town, under the late government of California, to surrender all public archives and documents, when this book (the one on which the certificate is endorsed) was given up, as containing the *only record* of the grants of lots in said town of Yerba Buena,"

§ 59. This book purports to contain the record of all the grants made in the pueblo or mission of San Francisco, and the place called Yerba Buena, at any time prior to the date of its delivery over to the American authorities. The dates of grants commence in 1839, and end with the 6th of June, 1846. It commences by recording the authority of the functionaries by whom the grants are made, and, for this purpose, has three titles or headings following each other successively. The first is as follows :

"Book in which are evidenced the possession of *solares* in the point (*punto*) of Yerba Buena, in virtue of the orders (*lo dispuesto*) of the Departmental Government."

In the second: "Are evinced those granted in the establishment of *dolores* in pursuance of the authority applied

for (*lo pedido*) by the prefecture of the district to the Government of the department, of which I have cognizance, as evidenced by the official note which is found on page 2."

The third gives the "Formula, showing the mode in which possession of solares to form habitations, have been given to the citizens (*vecinos*) of the jurisdiction of San Francisco de Asis."

The official note referred to, which was written by Jose F. Castro, acting as prefect *ad interim*, states, that he had received from the secretary of government an official communication under date of 16th of April, 1851, reciting that when the prefect Don Jose Castro made a visit to the north, he bore with him instructions from the government on various subjects, and, among others, it was ordered that *solares* might be granted to individuals in the establishment of Dolores, but they must not exceed fifty varas, which disposition of the government was now renewed in consequence of the official communication of the prefecture, dated the 6th of the same month, which his excellency (the Governor) had seen.

§ 60. In this book are recorded fifty-five grants, in all, including those which had been made at the Mission and Yerba Buena ; of these, ten were made either directly by the Governor, or in pursuance of his especial order—four or five were made in pursuance of a special decree of the prefect made in each case. These grants made by the Governor and the prefect, are as well of fifty vara lots, as of hundred vara lots, and some of them are also for lots situated more than two hundred varas from the beach. Two of the grants were made by the Governor on the 22d April, 1846. The remaining grants appear to have been made in virtue of the authority given by the Departmental government, which is referred to on the first page. One of the grants made by the Governor, was in form of a license to erect some sort of machinery, and the decree of concession contains these unequivocal words respecting the property in the land :—"It being understood, that as soon as the said *solar* shall be disoccupied

by the machine referred to, *it shall remain to the benefit of the nation for the uses convenient.*" It will be observed, also, that *no mention is made in this book of any town or "pueblo,"* although reference is frequently made to a *plan*. The place, in which the grants this side of Mission Creek are made, is designated and identified as the point (*punto*) or (*parage*) locality of Yerba Buena.

But, as another reason against this presumption that the ayuntamiento marked out the boundaries is that, as late as May 1st, 1844, there were no fixed and determined limits, for, in a grant made on that day by Governor Micheltorena to Francisco and Ramon Haro, of the Potrero of San Francisco, the following language is used: "I have resolved to permit them to occupy the Potrero mentioned, subjecting themselves to the measurement which shall be made of the *egidos* of the establishment of San Francisco." (Wheeler's Land Titles, page 12.) The author cited very justly remarks, (*id.* page,) "By this it appears the lands of the town had not been marked out."

§ 61. It is true, the opinion states, or rather would have us infer, that the first grants by an alcalde were made in 1835. But it cites no authority for the assertion, and it must be *presumed*, that it is an unintentional mistake. It is true, it also states, that, in the same year, Jose Joachim Estudillo applied to the Governor for a grant of 200 varas square. But, did he get it? The opinion itself shows that he did not. And, besides, it is highly improbable that any grants were made by the ayuntamiento on its sole authority before 1839. For, it was not until the spring of 1839, that any lots were laid out, or any plan for a settlement formed. In the spring of that year, Governor Alvarado directed the alcalde at the Mission, Francisco Haro, to cause a survey of Yerba Buena to be made, and to lay out streets and lots, and in the Fall of the same year, under this direction, Jean Vioget, a surveyor, made the first plan and survey of Yerba Buena. That survey took in only the small portion of San Francisco, which lies between Pacific street on the north, Sacramento

street on the south, Montgomery street on the east, and Dupont street on the west, with three 100 vara lots on the west side of Dupont street, and two 100 vara lots on the south side of Sacramento street, in addition—being equal in the whole to about eight or ten blocks of the present city.

In fact, no grants were made by the ayuntamiento, at any time, without the express authority of the Governor in each case, though two of this latter character were made, one to Jacob P. Leese, dated May 21st, 1839, and the other, about the same date, to Wm. A. Richardson.

§ 62. After stating that the alcalde was the proper person to preside over the ayuntamiento, and was the executive officer to carry into effect its resolutions and orders, the opinion proceeds as follows :

“ Hence all grants of lots made in San Francisco, from the beginning of 1835 to the latter part of 1839, were made and signed by the alcalde—he being the first member, president, and executive officer, of the ayuntamiento. Some of his grants read : “ By virtue of the authority in me vested, by the most illustrious ayuntamiento, I hereby grant,” &c. ; others simply, “ By virtue of authority in me vested, I hereby grant,” &c.

“ All grants of lots made,” &c. The word “ *all* ” embraces *two*—as we have before seen that only two grants were made during the existence of the ayuntamiento, and that each of these was made upon the express and special authority of the Governor, and the phrase in the succeeding paragraph, “ Some of his grants read,” and the following correlative phrase, “ others simply,” must be taken as limited to the two grants above spoken of. But this passage last cited contains another error of the same nature, as numerous others, which have been pointed out in the preceeding pages—that is to say, in hold-out the idea, that the sole authority of the alcalde to convey lands, was derived from the ayuntamiento, as the *proprietor* thereof—whereas, we have already seen, and shall establish, before we conclude, beyond the possibility of doubt, that the alcalde acted as the mere *servant or agent of the General Gov-*

ernment, in carrying into execution, in the distribution of lands, the orders of the Governor to the *Ayuntamiento*. In other words, the Governor having directed the *ayuntamiento* to make a particular grant, the execution of such orders of the Governor, was carried out by the *alcalde*, as the proper officer of the *ayuntamiento* for such purpose.

§ 63. "In 1839, it was thought by the governor, that the number of the population in San Francisco, being greatly reduced by the secularization and partial ruin of the Mission, was not sufficient to authorize the maintenance of an *ayuntamiento*, and *juezes de paz* were elected in place of that body, as directed in the law of March 17th, 1837."

This substitution of justices of the peace in place of *ayuntamientos*, instead of being made for the reasons set forth in the above paragraph, was made for a much better reason, that is, because the whole system of government by *ayuntamientos*, was abolished throughout Mexico, by the law referred to of 1837, and justices of the peace charged with the performance of their duties. "The number of the population of San Francisco greatly diminished." Why, at the establishment of the *ayuntamiento*, there had not, as yet, been built the first house in "San Francisco," nor was any effort made during the continuance of such body, to build up a town; and, at no time, did the population exceed, at farthest, the number of half a dozen.

It was, to say the least, very unfortunate, that it should have been found necessary to change the government by reason of a great reduction in the number of such a population. I have treated this paragraph, as if the opinion intended—as it clearly does—to speak of a great reduction in the population of that portion of territory which now constitutes the city of San Francisco—for the general context of the opinion clearly confines this expression to this definite locality, instead of permitting the extension of it to the whole *partido*. But, should it be meant by the word San Francisco, to designate *partido*, the remark is equally incorrect, for I have yet to hear that there was any great reduction in the population

of the *partido*, or, if there was, that that had any influence in the change of the law. I should not have noticed this mistake at such length, or perhaps at all, were it not for the fact, that this, like many other little things, noticed as errors in this opinion, show that the apprehension of the entire Mexican system from beginning to end, through all its ramifications, and changes, is erroneous, and rests, for its basis, upon an utterly fallacious hypothesis.

§ 64. "These *juezes de paz* commenced making grants of 100 vara lots, in the same manner as had been done by the *alcalde*. But a question now arose, whether the justice could, under the law of 1837 (*vide* acts 180-186), exercise that power in place of the *alcalde*, without a special ordinance of the departmental junta. To remove this doubt, a special ordinance was passed, and communicated by the Governor through the prefect, but limiting the grants by a justice, to 50 varas square.

The original of this communication is in the archives, and bears an earlier date than the letter of the sub-prefect, printed by Wheeler, (p. 15)."

§ 65. As above seen, by the new constitution of 1836, and the organic law of March 20, 1837, the *ayuntamiento* was abolished, and its functions devolved on justices of the peace, appointed by the governor, on the recommendation of the prefect of the district.

§ 66. These justices of the peace had the same authority *per se*, which the *ayuntamiento* had, to grant lots, that is, none at all—the whole power being derived from the government. And I submit, that it looks rather strange, upon the hypothesis of the opinion, that a question should be made whether justices of the peace could exercise the power of granting lots? That hypothesis is, that the *pueblo* or town was the absolute owner in fee of the lands. If so, why should there be any question about the *power of the justices*? And if such a question did arise, what right had the departmental junta to interfere, by special ordinance or otherwise, in the disposition of property, the *absolute title* of which was *vested in the*

town? For, vested rights were protected under the Spanish and Mexican system, as sacredly as they are under English and American law. And again, upon the hypothesis of such ownership, by what authority did the departmental junta interfere, by *restricting* grants by justices of the peace to 50 varas? There is no way of answering these questions and of solving these difficulties, upon the hypothesis of ownership of the lands in the town, as claimed in this opinion in *Cohas vs. Raisin*—whereas, upon the supposition that such lands still constituted a part of the national domain, and that these officers, whether governors, ayuntamientos, alcaldes, or justices of the peace, were but the *agents of the government in the distribution to actual settlers of its unoccupied and undisposed of lands*, according to the positions maintained in *Woodworth vs. Fulton*, this whole course of proceeding is natural, plain, satisfactory, and perfectly adapted to attain the ends in view.

§ 67. “The grants made by the justices of the peace at this period, are generally, By virtue of the superior order of the departmental government, I hereby grant,” &c.

As suggested in the last section, if these lands had been the lands of the town, or other than part of the national domain, the justices of the peace should and would have made their grants by virtue of some other authority than that of the departmental government—that is, they would have obtained their authority, and so expressed it, from the town, the owner of the lands.

§ 68. The opinion then proceeds to state that in 1843, Governor Micheltorena changed the municipal organization of San Francisco, and directed the election of alcaldes; that these alcaldes took the place of the former ayuntamiento, “but exercised all the powers conferred on the prefect.” I would respectfully ask, whence is derived the authority for the assertion that alcaldes exercised all the powers conferred on the prefects? The opinion cites none, and I am not aware that any such exists.

§ 69. And this municipal organization, says the opinion, continued until the occupation of the country by the United

States—"hence the grants made from the beginning of 1844, are made in the name of and signed by the alcalde." Some grants were made during this period by the alcalde, and some were also made by the governor—two of the latter as late as April 22d, 1846.

§ 70. I have thus traced this opinion down to the time of the occupation of California by the American army, and I have had occasion to notice some of the numerous errors in which it abounds.

We now come to a new era. On the 7th of July, 1846, possession was taken of Monterey, and subsequently of the rest of the territory. The President of the United States, as commander-in-chief of the army, directed his subordinate military officers to organize a *civil* government, for the purpose of preserving the domestic peace and quiet of the country, and preventing a state of anarchy. This was no more than is done in all cases of an armed occupation of a country, in the condition in which California then was; for the old government being broken up, a new one was absolutely necessary to subserve the purposes of police, and prevent or punish the commission of crime. The office of alcalde of San Francisco was filled by an American citizen, and continued thereafter to be filled by an American, until the office was finally abolished in 1850. These officers, as well as all others, except such as were appointed by the American military governor, or by the President of the United States, were elected by American citizens, settled or stopping, either as soldiers or otherwise, at the place called Yerba Buena.

§ 71. The opinion, after noticing some of the facts in the last paragraph, sums up the result of the whole investigation, as follows: "From this summary we must infer, First: That all grants made by the alcalde, from the beginning of 1835 to near the end of 1839, were made by the authority of the ayuntamiento." From what part of the "summary" is this inference drawn? I have shown before, that the facts from which this inference is drawn, are all without any ex-

istence, except in fancy, and can be only seen by the eye of faith. For, it has already appeared that only two grants were made during the existence of the ayuntamiento, and both of these upon the express application to, and order by, the government.

The second inference from the above summary, "that the grants made by justices of the peace, from 1839 to 1843, were made by authority conferred on them in the absence of alcaldes, by the departmental junta, in virtue of article 180; of the law of March 17th, 1837," is not open to objection after substituting the word "government" in the place of the word "junta;" for, we have already seen that some of these grants were made by virtue of authority derived from the *governor*—some from the *prefect*.

§ 72. The third inference drawn is: "That the grants made in 1844, 5, 6, and beginning of 1847, by alcaldes, were made by virtue of their office, as constituting the municipal government of this pueblo, under Governor Micheltorena's Proclamation of November 24th, 1843." This inference is wholly without authority, either in the opinion or out of it. From what part of the "summary" is this inference drawn? From that, which states that alcaldes took the place of the former ayuntamientos? If so, they must have derived their authority to grant from the same source from which the ayuntamiento derived it; so also, if they exercised the powers conferred on Prefects, they must have derived the power to grant from the same source as the Prefect—that is, from the laws, and from the departmental government.

§ 73. The fourth and last inference is: "That grants made by alcaldes, after the 15th of September, 1847, must be presumed to be made by the authority of the ayuntamiento or council, so long as that body existed." This inference is a begging of the whole question in issue; for, it implies and presupposes that this ayuntamiento had the power to confer such authority—the very position which is denied in substance in *Woodworth vs. Fulton*, and is controverted here; for, my position is, that after the Americans took possession of

the country as a military conquest, neither had the *alcaldes* the power by virtue of their offices, nor could the *ayuntamiento*, nor the military governor, nor even the President of the United States, confer upon the *alcaldes* that power—and, this proceeds upon the ground, that the lands were part and parcel of the national domain of Mexico, and, as such, could not be granted.

§ 74. The opinion then proceeds: "I come now to the particular consideration of the effect of grants made after the military occupation of this country, by the forces of the United States." Yet, in no subsequent portion of the opinion is this question "considered." It is true, the opinion afterwards asserts a doctrine from which it is necessarily implied, that a state of war and a state of peace are the same thing—that an inferior officer of a conquering army may sell or give away, to his fellow soldiers or fellow citizens, the private real property of the vanquished, without any orders from his own government, or even from his superior officer in command; that not only the right of confiscation of the lands of a vanquished enemy,—a right, which authors on international law declare has never been exercised since the Norman conquest in the eleventh century,—exists, and may be exercised at the present day, by a conquering army in the temporary occupation of a province of the vanquished,—but that this right may be exercised by every petty officer, without the authority of his commander-in-chief. No authority is cited in support of so novel a doctrine, nor is any endeavor made to sustain it by reasoning. It rests on bare assertion, and that is called "coming to the consideration of the subject." I think I could satisfy the Court, how widely the opinion is mistaken in this respect, provided international law should be admitted to have any binding efficacy in this State;—but this branch of the subject is not involved in the facts of the present case, and I therefore pass it by, expressing, at the same time, the desire, that, on some future occasion, an opportunity may be presented of "considering" that branch also. In the present case, I am limited to the question of ownership or no ownership of the land in the town.

§ 75. The opinion, then, after declaring itself not bound by the doctrine of *stare decisis*—a point, which I shall have occasion to urge upon the attention of the Court in a subsequent portion of my argument, proceeds to “consider” the case of *Woodorth vs. Fulton*. “In that case,” it says, “as affecting the present question, the Court assumed,—first, that San Francisco was not a pueblo.”

§ 76. I would be pleased to learn from what source the opinion derived the information, that the case of *Woodworth vs. Fulton* assumed that San Francisco was not a *pueblo*. It certainly is not derived from the case itself, and, from whatever source derived, it is not correct. It is a mistake, to suppose that the case of *Woodworth vs. Fulton* assumed any such thing. It merely declared, that it did not appear, from the proof in the case, that there was a pueblo, or, if there were, what its boundaries were,—facts, of which, is there said, the Court could not legally, and ought not to, take judicial notice, (see, Cal. Rcp., 306–7,)—and furthermore, it was a matter of perfect indifference in the decision of that case, as it is in the correct decision of every case, whether Yerba Buena or San Francisco was, or was not, a *pueblo*. The true question is, not whether there was a pueblo or whether there was not, but whether the pueblo, town, village, hamlet or settlement, or whatever other name you may choose to give to a small collection of settlers, was the owner of any land; and the correct position of the Court in *Woodworth vs. Fulton* is contained in what is stated in the opinion, as being next assumed, that is, “that conceding it (San Francisco,) to be a pueblo, there was no legislation, general or special, which vested in it the title to land.” That was the position relied upon by the Court, and I have yet to learn that that position has been shaken or overturned by any thing contained in the opinion of *Cohas vs. Raisin*. On the contrary, that position has been sustained by every *lawyer*, who has ever examined the question, by the unanimous decision of the board of United States Land Commissioners for California, by the judicial decision of the Circuit Court for this circuit—and finally by the Supreme Court of the United States itself.

§ 77. After noticing a third position, which it asserts was assumed in *Woodworth vs. Fulton*—but which I here pass by as not involved in the present case—the opinion proceeds as follows: “In the subsequent case of *Reynolds vs. West*, (1 Cal. Rep., 323,) the opinion was given by the same judges who decided *Woodworth vs. Fulton*. The question was as to the validity of a grant in San Francisco by a Mexican alcalde, before the war. The title was sustained, and of course operated as an abandonment by the Court of the first two grounds, I have stated, as taken in the case of *Woodworth vs. Fulton*.” Now, does the opinion understand the cases of *Woodworth vs. Fulton* and *Reynolds vs. West*, or is it guilty of a willful misrepresentation of the two cases, or must it be under the imputation of an utter and disgraceful ignorance, as well of Spanish and Mexican, as of international law? The case of *Reynolds vs. West* is clearly misunderstood, or misrepresented. The impression is sought to be made that the Court there decided, that the grant in question was absolutely valid, and unimpeachable under all or any circumstances; whereas, they decided no such thing. They held that, as nothing appeared in the case to show want of power in the officer to make the grant, he must, under the decisions of the Supreme Court of the United States, be presumed to have had the authority. And this presumption was indulged in solely upon the ground, that he was an officer of a foreign government, and empowered by such government to grant or distribute to actual settlers, small parcels of the public domain. So far from the case of *Reynolds vs. West*, “operating as an abandonment” of any point decided in *Woodworth vs. Fulton*, it is an express re-affirmance of the latter case; for, the very point upon an American alcalde’s grant, which was decided in *Woodworth vs. Fulton*, again arose in *Reynolds vs. West*, and was again decided the same way. The two cases are in perfect harmony; and nothing but a misunderstanding of those two cases, or a design to misrepresent them, could have induced the assertion, that any thing contained in the case last decided, operated as an abandonment of any point

determined in the first. Both cases proceed upon the principle, that the land in question constituted part of the national domain of Mexico—that, before the war, while the country was subject to Mexican law, any Mexican officer, duly authorized by the law for such purpose, might dispose of portions of the public lands—but that, upon the conquest of the country by the Americans, the Mexican laws relating to the sale or distribution of the public domain ceased, and that, neither an American alcalde, nor any other officer, had authority, after such conquest and after the public lands had passed to the United States, either under the Mexican law, for that, so far as regards the disposition of the public lands, had been abrogated by the conquest, or under a law of the United States, for none such existed authorizing the disposal of any public lands in California, to give, grant or sell any portion of such lands. What then must be thought of an opinion which, either through carelessness, design or ignorance, not only mistakes the facts of the very case in which the opinion is delivered, but misrepresents former decisions of this Court, for the purpose of sustaining a hypothesis, which is countenanced only by such as are equally ignorant of the Mexican laws, and of the Mexican language, and which is discarded equally by lawyers and Courts who have taken the pains to inform themselves upon the subject.

§ 78. The opinion then proceeds—"I have shown before, in this opinion, that Mexican towns were invested with property in lands; that by the Mexican decrees for the secularization of missions, it is shown that San Francisco was a mission; that the missions were required to be converted into pueblos."

§ 79. Of what avail is it to show "that Mexican towns were invested with property in lands?" The question is not, whether Mexican towns were invested with property in lands, as a general or as a partial rule, but whether the pueblo, town, or city of San Francisco in particular, was invested with property in the identical land in controversy. American towns, as a general thing, are invested with property in

lands ; but it would be a strange deduction from this circumstance, to infer that all American towns were invested with lands, or that any town in particular was invested with the title to a specific lot which might happen to form the subject of litigation. Would it be a legitimate legal inference from the fact that individuals are invested with the title to real estate, that A, or B, or C., was the owner of a specific lot in dispute ? or, from the fact that corporations are generally the owners of property, that a certain manufacturing or commercial corporation was the owner of a specific article of property ? Yet all these must be legitimate deductions, and correct legal conclusions, according to this quotation from the opinion in *Cohas vs. Raisin*.

§ 80. It seems, however, that San Francisco was a mission. What San Francisco ? or where ? It is true there was a mission of San Francisco, but that was situated in a place different from what is claimed in *Cohas vs. Raisin*, as the pueblo or town of San Francisco. But, waiving that, I ask, as I have asked over and over again, how it helps the conclusion in the opinion, if San Francisco was once a mission, and had been changed into a pueblo ? Neither fact proves, or even tends to prove, that either the mission or pueblo was the owner of any land.

§ 81. After recapitulating that lands *were to be* granted to new pueblos, by the Law of August 9th, and that directions were given for the formation of an ayuntamiento of San Francisco, with directions to fix its boundaries—positions which I have already examined, the opinion proceeds :

“ It will be remarked, from what has preceded, that these are not grants of any portion of the public domain, made by officers of the conquering power, but are grants of municipal lands, made by the regularly authorized municipal authorities, under the laws, usages, and customs of the country, which were not changed, or interfered with, by the military or *de facto* government, organized under the laws of war.”

§ 82. Now, I would like to be informed from what portion of the opinion, “ which has preceded,” it will be, or can,

with justice, be "remarked," that the lands spoken of were "not portions of the public domain," but were "municipal lands?" It has not been shown, nor been attempted to be shown, that the government had ever parted with its right to these lands ; it has not been shown that any grant had ever been made of them, or any part of them, to the pueblo or town of San Francisco, nor has it been shown that there was any "legislation, general or special," which conferred the title to these lands upon the pueblo or town of San Francisco. The only thing from which it can be "remarked," that these lands had ceased to form a part of the public domain, is, that the opinion says so ; this is the sole authority we have for supposing them to be "municipal lands." We have seen a great deal, to be sure, from which it may be remarked that pueblos might become the owners of lands—that they became such owners, whenever the government, through the proper channels, chose to confer upon them such ownership—and that, *after they had acquired* such ownership, they had the right to dispose of the lands, subject to the regulations of law—and we have heard a good deal, besides, of directions having been given to mark out the boundaries of a town—but I defy the most scrutinizing eye to discover a single sentence in that portion of the opinion, which has "preceded," or in that which is to follow, from which it can be legally or properly inferred or "remarked," that any portion of the land within the limits of the pueblo, town, or city of San Francisco, had ceased to form a portion of the public domain, and had become municipal lands. And here is the great and fundamental mistake, upon which this opinion is raised. It *assumes, without proof*, that these lands had been severed from the public domain and reduced to private ownership. This, however, is begging the entire question. This is the very point in dispute.

§ 83. "It will not be denied," says the opinion, "that the pueblo retained, during the war, all its rights to municipal lands, which had been conferred upon it previous to the war." Of course, no one will deny that. But the question

again recurs, *what rights to municipal lands had been conferred upon it previous to the war?* The opinion has not yet shown that any rights to municipal lands, or any other lands, had been conferred upon, or acquired by, the pueblo or town of San Francisco, previous to the war, or at any other time. And, for this defect of proof, the best of reasons exists—no rights to land had ever been conferred upon it.

§ 84. “And,” continues the opinion, “as all grants of land made to it, must have been in full property, the right to alienate was incident to ownership.” Another assumption, that grants had been made to the town, whereas, in fact, no such grant ever was made; and there never has been produced, either in this opinion or out of it, one particle of evidence tending to establish that any grant of lands had ever been made to the town. But, if such grant had been made, it seems, it “must have been in full property.” Exactly the reverse of this is the fact. No grants ever were made to any town in Spain or Mexico in full property, with the free right of alienation. On the contrary, grants to towns, whenever made, were made for specific purposes, and conferred upon the town no more than the usufruct—and the pueblos or towns could, in no case, alienate such lands without permission of the government.

§ 85. The rest of the opinion is taken up with “considering” the authority of American alcaldes in San Francisco to alienate the lands assumed to have been owned by the town. But, as I have before remarked, no question arises upon their right to alienate in the present case, and I therefore pass over this portion of the opinion, barely observing, that the right of American alcaldes to alienate, falls, of course, with the fall of the assumption of ownership of the lands by the town. I, now, draw near to the end.

§ 86. “We have,” it says, “come the conclusion, and so announce as our decision:

First: That by the laws of Mexico, towns were invested with the ownership of lands:

Secondly: (Which treats of the power of alcaldes to alienate, and is, therefore, immaterial in this case):

Thirdly : That before the military occupation of California by the army of the United States, San Francisco was a Mexican pueblo, or municipal corporation, and was invested with title to the lands within her boundaries:

Fourthly : That a grant of a lot in San Francisco, made by an alcalde, whether a Mexican, or of any other nation, raises the presumption, that the alcalde was a properly qualified officer, that he had authority to make the grant, and that the land was within the boundaries of the pueblo."

§ 87. This last quotation ends the opinion, so far as regards the point under discussion in the case at bar ; and these conclusions are but reiterations of positions, which I have already examined in the course of this argument, and which I have shown to be utterly destitute of any foundation for support either in, or out of, the opinion.

§ 88. To sum up, then, a portion of the illogical and illegal views taken in this opinion : it assumes, without a *scintilla* of proof, the following several positions :

First: That there was an organized town or municipal government, extending over, and confined to, the particular locality now known as the city of San Francisco :

Secondly : That a grant, or that grants, of definite parcels of land, had been made by the Mexican government to such town :

Thirdly: That such grant or grants were of lands situate within the present limits of the city of San Francisco.

Fourthly: That such grant or grants embraced all the lands within the limits of the present city.

Fifthly: That any grant made by an alcalde was within the boundaries of the assumed Mexican town or pueblo.

§ 89. Now, it would seem, that any person endowed with capacity to distinguish between questions of law and questions of fact, would see that the several positions above mentioned, which are assumed by the Court as matters of law, and decided as such, are strictly and palpably questions of fact, determinable like other questions of fact.

I have now reached the further side of this "Stygian bay" *bag*

of reasoning. I have shown that it is one undistinguished mass of mistakes in fact, or of errors in law ; that it is made up of assertions without proof or authority, and of conclusions without premises—that it distorts facts and crucifies legal principles—that it assumes the province of the legislator, in creating the law, while professing to perform the functions of the judge in interpreting and administering it. It is a melancholy subject of reflection, both for the people of this State and for the citizens of other States having interests here, that rights to property, of vast magnitude, are made to depend upon so flimsy a texture.

§ 90. I have, thus far, insisted that this opinion was, at the time it was delivered, contrary to the settled law of the State ; and also that, in and of itself, it is entitled to no consideration. I now proceed to show that it is in direct opposition to the unanimous opinion of the Board of Land Commissioners for this State. It is scarcely necessary for me to add that, if any persons have ever had the means of arriving at a correct conclusion on the subject under discussion, they are the gentlemen who constituted that board. Every particle of proof, every document, every law, ordinance, or regulation, which could tend to establish the ownership of San Francisco in any lands, was produced before, and considered by them. Able counsel exerted their talents, ingenuity, and eloquence, to sustain such ownership ; but the board, after a thorough investigation of the whole policy of Spain and Mexico, with every source of information at their command, and after the most mature deliberation, unanimously decided in exact conformity with the conclusions arrived at in the case of *Woodworth vs. Fulton*, and diametrically opposite to the assumptions of the opinion in *Cohas vs. Raisin*.

§ 91. It is true, the board unanimously affirmed the claim of the city of San Francisco to certain lands ; but their decision was based upon the ground, that the act of congress of 1851, gave to the city that portion of the *public domain*, which was confirmed to it, and not upon the ground that the town,

city, or pueblo, of San Francisco had any claim to such lands under any Spanish or Mexican law, or by virtue of any grant from Spain or Mexico.

§ 92. Mr. Com'r Thompson, who delivered the opinion of the majority of the board, discusses the subject now under consideration as follows :

"It is exceedingly difficult with our imperfect knowledge of the Spanish and Mexican laws on the subject, to determine what was the precise character of the rights which the pueblos held in the lands assigned to them. The lands for *propios* seemed to be under the control of the municipal authorities, for the purpose of raising funds for their support and other municipal purposes. The regulations generally prescribe the manner in which this should be done. In the plan of *Pitic*, the mode proposed seems to have been by cultivation at the expense of the town—the profits being appropriated to the municipal expenses. In other cases they were authorized to lease or dispose of them in *censo enfiteutico*, as in the California regulations of Aug. 1834. The *egilos* or common lands stood on an entirely different footing ; they were not regarded in any sense as the property of the corporation, but were set apart and assigned for the common use of the *vecinos* of the pueblo.

"But whatever may have been the interest which the towns had in those lands, or the tenure by which they held them, it is certain that they never had such a right of property in them as would enable them to alienate or dispose of in any manner. Both the right to grant house lots or farm lots and to dispose of *propios* by lease or enfiteutic rent was under authority specially delegated by the government for that purpose, and revocable at its pleasure. This is proved by all the laws, regulations and instructions to which we have had access—all of which go to show that the right of property remained in the government, subject to the use of the towns for the purposes and under the restrictions imposed by the laws and regulations. Authorities might be multiplied almost indefinitely to sustain this position ; indeed we find the principle pervading all the laws of Spain and Mexico on the subject, and uniformly recognized in their application by the authorities whose duty it was to carry them out. Elizondo, in his *Practica Universal Forense*, volume 3, page 109, lays it down distinctly in the following passages : 'For,' says he, 'The kings, the fountains of jurisdictions, are the owners of

all the *terminos* situated in their kingdoms, and as such can donate them, divide or restrict them, the same being true of their *pastos*, although the pueblos enjoy them, it being presumed that they are conceded only so far as respects their use and administration, the property remaining in the sovereigns themselves, so that they may limit them afterwards, enlarge or restrict them, or give any new form to the enjoyment thereof; and hence it is that the pueblos cannot alienate their *terminos* and *pastos* without precedent royal license and authority.'

"Again, volume 5, page 226, he says, 'There is nothing whatever designated by law as belonging to towns other than that which, by royal privilege, custom or contract, between man and man, is granted to them, so that although there be assigned to the towns at the time of their constitution a *territorio* and *pertinencias*, which may be common to all the residents without each one having the right to use them separately, it is a prerogative reserved to the princes to divide the *terminos* of the provinces and towns, assigning to these the use and enjoyment, but the dominion remaining in the sovereigns themselves.'

"The decree of the Spanish Cortes of the 4th of January, 1813, is in itself a full recognition of this principle. The object and intent of that law was the distribution and reduction, to private property, of all the lands previously occupied and used by the towns, and it prescribes minutely the manner in which this shall be done, and treats them throughout the whole act as public or royal lands. If these lands had been the private property of the pueblos, the Cortes would have no right to decree their sale and distribution, than they would have had to alienate or dispose of the private property of individuals. But it is evident from the whole tenor of the decree that they were regarded as public lands, and subject to be disposed of at the pleasure of the sovereign power. This law was probably never carried into effect in Spain; but there can be no doubt that in common with other decrees of the Cortes, which were revived by the Spanish revolution of 1819, it was in full force in Mexico at the time her independence was established. These decrees have since been repeatedly recognized by Mexico as a part of her civil code; and that of the 4th of January, 1813, unquestionably constituted the foundation for the power which was uniformly exercised by the Mexican authorities in California, in the distribution and granting the common and other lands of the towns, in the same manner as other portions of the public domain, except

that in the former ones the lands were granted subject to the *canon* or tax which might be imposed for municipal purposes.

'The method usually adopted, when a petition for land supposed to be included in *egidos* (commons,) of a town, was presented to the Governor, was for that officer to enter an order referring it to the *ayuntamiento*, who reported whether the lands belonged to the town, and if so, whether they might be granted without detriment to the corporation.

"If the report was favorable to the grant, it was made in the customary form of a colonization grant, with the condition above mentioned ; and in some cases with the additional one of subjecting the lands granted to the enjoyment by the *vecinos*, or the pueblo of the common right of wood, water and pasturage. Among the numerous cases of this description, which have been presented to the commission, we refer particularly to the expedients in cases No. 353, Jacob P. Leese for 'Punta de Pinos ;' No. 535. Rafael Estrada for the 'Rincon de las Salinas ;' No. 593, Montina Castro for 'Shequel,' in which the grants were made by Governor Figueroa, 1833 ; No. 191, Chas. Walters for 'El Toro,'—grant made by Governor Castro in 1835 ; No. 456, Antonio Igo. Abela for 'Sansal Redondo,'—grant by Governor Alvarado in 1837 ; and No. 427, Thomas Sanchez for 'La Cienega,'—grant by Governor Micheltorena in 1843. All of these are grants of lands supposed to be within the *egidos* or common lands of the respective towns near which they are situated. These grants were made at different times, extending through a period of ten years, and by nearly all the persons who filled the office of Governor during that time, and no question seems to have been raised as to the authority of the Governor to grant them as portions of the public domain ; but being situated within the corporate limits of towns they were made liable to be taxed for municipal purposes.

"By article 77 of the organic law of the 20th of March, 1837, the distribution of the common lands of the towns was committed to the prefects of the respective districts. The powers of those officers over the subject was considered by the board in their opinion in the case of Manuel Larios, No. 297, for lands near San Juan Bautista, in which their authority to grant those lands, as belonging to the government, was fully recognized.

"The proceedings of the territorial government in relation to the distribution of lots in the pueblo of San Francisco, are in entire conformity with this view of the question. The first application of which we find any record for the grant of

a house lot or farm lot (*suerte*) in the new pueblo, was that of Jose Joaquin Estudillo, referred to in the former part of this opinion, where the action of the Governor and territorial deputation on the subject is fully set out. From these proceedings it is clear that the lands were regarded as the property of the nation, and as such subject to the disposition of the Territorial authorities, according to the law regulating the subject, and this too notwithstanding the fact that they are expressly recognized as belonging to the jurisdiction of the ayuntamiento of San Francisco. The deputation accordingly reported in favor of the expediency of making the grant, limiting the quantity to that specified in the 15th Article of the Regulation of Nov. 21st, 1828.

“ This reference to the regulation shows that the deputation considered that they were acting upon its authority, from which alone they derived their power to dispose of the public lands, and as a necessary consequence that they regarded the lands referred to as comprehended in that description. To avoid, however, the numerous applications which they supposed might be made for building lots in the new pueblo, they passed a resolution authorizing the ayuntamiento to make such grants within certain limits specified in the resolution. The order of Gov. Castro, of the 26th October, 1835, communicating this resolution of the deputation to the ayuntamiento and directing future application for such grants to be made to that body has already been quoted, and was unquestionably the authority under which all subsequent grants of lots of one hundred varas square were made by that body or the justices or alcalde who succeeded it in the government of the pueblo.

“ A careful examination of the authorities on this point, in connection with the uniform practice under the Spanish and Mexican governments, as shown in the numerous orders, decrees and regulations and the acts of the public functionaries in relation to the subject, establish clearly in our opinion the following propositions : —

“ 1st, That under the laws of Spain and Mexico no right of property in lands assigned to pueblos or towns was ever vested in those corporations by which they could alienate or dispose of them in any manner — but such assignment only conferred a right to use and occupy them in the manner prescribed by the laws, under the direction of the superior authorities.

“ 2d, That the right to alienate or dispose of such lands, whenever exercised by the municipal authorities, was by virtue of powers specially delegated to them for that purpose

by the king or nation in the same manner as the authority to dispose of other portions of the public domain was conferred on other functionaries specially charged with the subject."

•§ 93. I now quote from the opinion of Mr. Commissioner Felch, who, both as a lawyer and a judge, will bear a comparison with any in the Union. He dissented from his associates solely upon the question as to the boundaries, which should be assigned to the city of San Francisco under the Act of Congress. On all other points, particularly on the point under discussion, he agreed entirely with his associates. After stating that "no authority of Spanish or Mexican law concedes to a town or pueblo all the land within its jurisdiction," he proceeds as follows:—

"At the opening of the session of the Departmental Assembly on the 16th day of February, 1840, the following explicit language is used in the Message to the Governor of that body on the condition of the Department, while speaking in reference to the town therein: 'None of said towns, with the exception of Monterey, *has its commons and landed property (ejidos and propios) marked out*, which to each of the Municipalities should be fixed in order to know its legal property (fundo legal) *for which reason the Government, in making concessions of land in the vicinity thereof granted the same temporarily waiting for such a regulation*, and regarding the same subjects, proper reports have been repeatedly asked. Your Honorable Board however in view of all this, exercising the power conferred upon you in Part 1, of the Article 45, of the above mentioned law (that of March 20th, 1837) and in concert with the Government will arrange what may be deemed proper.'

"Here is an explicit and official statement that in 1840 *none of the pueblos or towns of California except the capital city, had had any lands assigned to them for their public uses*. Six years before a plan for this purpose had been promulgated by Governor Figueroa, in which the municipal authorities were enjoined to proceed and obtain such assignment, but evidence is scattered every where throughout the records of the Department, which shows that up to the time of the conquest, no such assignment was in fact made to any of the towns. That the locality of the present City of San Francisco formed no exception to this statement is also directly established in my opinion by the proofs in this case. The lands within the al-

leged limits continued to be treated as other portions of the public domain. The Governor continued to make grants within its boundaries down almost to the raising of the American flag, in larger parcels as well as small lots. It is true the local authorities made small grants or rather gave possession of small lots to individuals in the vicinity of the Mission and also at Yerba Buena, but the authority under which they were made and the conditions attached to them are such as to indicate not a claim of ownership or the right of use and disposition, in any town or corporation, but that the land was still unembarrassed by any such assignment or concession. We have before us the evidence of the authority under which the local authorities disposed of lots. We have also evidence of specific grants issued by the ayuntamiento during its existence, and a certified copy from the Recorder's office of a book purporting to be a record of all the grants issued for such lots after that body ceased to exist in 1838. Two grants only are proved to be made by the *ayuntamiento*, one to Jacob P. Leese, and the other to W. A. Richardson, and both of these are proved by the testimony of said Leese to have been granted by an express decree of the Governor, whose order to that effect was brought by him to the ayuntamiento. The record of subsequent grants above mentioned shows only two concessions of lots in 1839. In 1840, seven, three declared to be under the decree of the Governor, and the others by the Justice of the Peace. In 1841 two grants were made by the Justice, one of which recites that the grantee had the Governor's decree for a fifty vara lot, and the Justice concedes another lot adjoining it. In 1842 two entries only are made, one of which is stated to be under a grant from the Prefect, the other under the Superior Decree of the Governor. In 1843 seven grants were made, in 1844 thirteen, and in 1846 seventeen. Two of these are by Governor Pico, the other in the usual form of Justice's grants.—Most of these grants are of lots in Yerba Buena, but some are at the Mission Dolores.

“A dispatch from Jose Castro, acting Governor, is presented certifying that the Territorial Deputation in session of the 22d September, 1835, approved that the Ayuntamiento grant lots (solares) not exceeding one hundred varas in the place named Yerba Buena, ‘paying to that Ayuntamiento the fees (canon) which *may be designated* to him as pertaining to the propios,’ &c. In the book of Records above mentioned is found the authority under which the grants were made after the establishment of the Offices of Prefect and Justices of the

Peace under the law of March 20, 1837. It is there shown that after his installation the Prefect received a note from the Departmental Government wherein the Government concedes that building lots in the establishment of Dolores may be granted to vecinos. Information of this order appears to have been received by Francisco Guerrero the Justice at that place, as early as the first of June, 1839, and on that day the draught of a form for putting individuals in possession of lots was prepared by him, entered of Record, and forwarded to the Prefect. The written decree of the government authorizing it, seems to have been in possession of Guerrero at that time, and the record shows that he subsequently applied for and obtained a copy of it, and in making a concession under it on the 18th day of November, 1840, a new form was adopted by the justice, making express reference to this authority of the departmental government under which the grants were made. The first form subjected the grantee to all police regulations which might be established. The second contained the additional condition that the grantee should "be subject to pay such tax as he may be liable to according to the edict on the subject, *in case it be so determined by the government, the same having been already consulted.*" All the grants made by the justices, with perhaps a single exception, were made in the manner above specified, and under the express condition that they should thereafter be subject to the proper tax, if the lands should subsequently be assigned for municipal uses.

"The authority to the ayuntamiento and that to the justices of the peace, certainly imply that the lands had not, at their respective dates, been dedicated or assigned to the particular use of any community or corporation, and it does not purport to make such an assignment. It purports nothing more than to authorize the local officers, for certain purposes and on specified conditions to grant small lots on behalf and in the name of the government, not to concede ownership, or even usufruct to any officer or community. It was a power which might at any moment have been reversed, and whether existing or revoked, the ownership and power of disposing of this land, as of other portions of the national domain, was with the government. These documents which are the source of the authority under which all the grants (so far as the testimony in the case exhibits them,) which have ever been made in this locality, by the local officers, all explicitly show that they were made subject to a tax (canon,) for the municipal authorities, if in future such authorities should be here estab-

lished, and the land be assigned by the government for common land or *proprios*, and showing clearly that no such disposition of them, had as yet been made.

“It is perhaps scarcely necessary to add more to this subject. But if it were admitted that the ayuntamiento constituted the municipal government of a pueblo here established, and nothing more, and even that the lands north of the Vallejo line, were assigned for the use of the municipality in 1834, it would still admit of great doubt, to use no stronger term, whether all rights to it had not ceased long before the conquest and cession of the country to the United States. The law of August 20, 1837, changed materially the internal organization, both political and municipal, of the department. This law abolished all the ayuntamientos throughout the country, except in the capital of the department, ports with a population of 4000, towns with 8000 inhabitants, and those which had ayuntamientos previons to 1808. Under this law, the ayuntamiento which was organized at the Presidio in 1835, and which subsequently held its session at the Mission, ceased to exist, and no other was ever established under Mexican authority in its place. Prefects, sub-prefects, and justices of the peace were appointed under this law in the districts, the ancient Spanish official, the Alcalde, being only elected where the law retained the ayuntamiento. In towns containing one thousand inhabitants or more, the justice of the peace, subject to the supervision of his superior, succeeded to the faculties and obligations of the ayuntamientos which were abolished, except that as to the management of municipal funds, these were subject to the discretion of the departmental junta. But this locality, including as well the Mission and Yerba Buena, as all the land on the north side of the Vallejo line, had not that number of inhabitants.

“The law purposely provided for no successor where ayuntamientos had existed in towns with so few inhabitants, virtually abolished the municipal organization, and placed them under the ordinary authorities of the district and partido where they were situated. Where, as in this case, no town *de facto* existed, and the municipal authorities were abolished by law, it would seem that lands assigned previously for their use, and held by no other tenure, would again fall within the full control of the nation, and after the interval of some eight years from the time of the abolishing of the municipal authorities under this law, and the conquest of the country, without municipal successors, it is difficult to see how the ownership of this land could be elsewhere, at the time of that conquest, than in the Mexican nation.”

§ 94. Thus the unanimous opinion of the Board of Land Commissioners is found to be in strict conformity with the decision of this Court in the case of *Woodworth vs. Fulton*.

§ 95. The same question has been passed upon by the Circuit Court of the United States, for this Circuit. In the case of *Field vs. Seabury, et. al.*, tried before the Circuit Court in 1856, the parties claimed under American alcalde's grants. The Court, Judge McAllister presiding, charged the jury that the grants were absolutely void—that the alcalde had no power or authority to grant the land, which land constituted a part of the public domain of Mexico before the war, and had passed with the conquest to the United States—that the parties were chargeable with notice of such want of power and authority in the alcalde, and, therefore, that the possession was not even colorable. And, on error to the Supreme Court of the United States, although the judgment of the Circuit Court was reversed on another ground, the Court approved that portion of the charge of the Circuit Court, which related to the point now in issue, and declared that, "in this the Court was correct." And I may be permitted to state, though like the opinion itself, somewhat out of the case, that I have, on several occasions, had the curiosity to interrogate intelligent Spanish gentlemen upon the point at issue, who have uniformly replied, that the fact of the existence of a *pueblo*, villa, city, or other municipal organization, was no evidence, that it was the owner of the lands lying within its boundaries, and that a *pueblo* might well exist, as numerous *pueblos* did, in fact, exist, both in Spain and Mexico, without owning, or having an interest in, any lands whatever. And I have it from the best authority, a gentleman of undoubted truth and integrity—that he has propounded the same, or similar, questions to advocates of the first legal talent in the city of Mexico, and that their uniform reply was, in substance, the same as above stated—and that they further expressed themselves at a loss to conceive, how a Court could imply or presume a *pueblo* to be the owner of any land, without proof of an express grant, or, what would be equivalent thereto, an

act of the legislative power specifically and distinctly conferring such ownership.

§ 96. I will, also, add, though, it is somewhat out of the case, I believe it to be the general impression of the bar, that the opinion in *Cohas vs. Raisin* is not law. In fact, I have never yet met with a *lawyer*, who attempted to defend or sustain that opinion, although, I did once converse with a gentleman, who had been admitted to the bar, who thought it law. And, it may be asserted, with safety, that a large majority, not only of the profession, but of the community at large, are now persuaded of the correctness of the positions taken in *Woodworth vs. Fulton*, and of the erroneous views of Spanish and Mexican law adopted in the opinion in *Cohas vs. Raisin*. The former case, it is true, encountered at first a violent, bitter, and unscrupulous hostility. But that has passed away, and "the sober second thought of the people" has reversed the respective positions which *Woodworth vs. Fulton*, and *Cohas vs. Raisin*, at first, occupied.

§ 97. The question, then, arises, ought the opinion in *Cohas vs. Raisin*, to be sustained by this Court. It will be remarked that, though several cases have subsequently been decided on the faith in that opinion, none has been made to rest on an independent process of reasoning, by which the same conclusions are deduced. Each subsequent case, of the class referred to, leans for support upon the opinion in *Cohas vs. Raisin*, and upon that alone. If that opinion cannot be sustained, then, neither can the decisions which have followed it. If, by the authority, upon which these have been decided, "a rule well settled and universally acquiesced in has been violated," "there is no principle which compels the further observance" of such authority. If the foundation in *Cohas vs. Raisin* be undermined and brushed away, the superstructure must likewise fall. It would be absurd for a Court to wander on in error forever, because its predecessors, under the pressure, perhaps, of peculiar conditions of popular feelings, had abandoned the straight and narrow path of law. Equally absurd would it be for the Court to persevere in ad-

ding error to error, in the vain hope that they will thereby succeed in establishing, on a sure foundation, the tottering fabric of *presumption*, raised in *Cohas vs. Raisin*. The same thing may be decided again, and again—but it will not stay decided—the doctrine of that case may be affirmed, and re-affirmed—but it will not rest affirmed. The common sense of the profession revolts against an opinion, which stands in diametrical opposition to all their legal notions of the proper distinction between law and fact, and to all their logical ideas of the proper relation between premises and conclusions. The point is raised on every trial at *nisi prius*, where it can be raised, it is argued whenever it properly presents itself—and it will continue to be raised and argued, until law shall, once more, assert its sway, and this new doctrine of presumption pass into forgetfulness.

§ 98. This Court, assuredly, will not carry the doctrine of *stare decisis* further than it has heretofore been carried—especially, when the necessary result would be to perpetuate an egregious error. What, then, is the practice of the Court, in regard to the doctrine of *stare decisis*? The very opinion, which has occupied so much of our attention, precludes the Court from carrying this doctrine to extremes. “However great,” says the opinion, “is my regard for the doctrine of *stare decisis*, there is certainly no principle which compels its observance, *where a rule well settled and universally acquiesced in has been violated*.” Just the case in hand. It would seem as if the opinion was declaring, in advance, its own doom. Its condemnation is pronounced in its own words. With a degree of self-consciousness, not usually attained, it portrays its own character, and passes sentence on its own delinquency. Where, if not in that opinion, will you find “a rule well settled and universally acquiesced in, violated?” A rule settled by the universal and uninterrupted usage of the Spanish and Mexican law from the earliest ages to the present time—settled, by an uniform course of decisions in this very Court—settled, by the unanimous judgment of the United States Board of Land Commissioners—settled, by the decisions of the

Circuit Court of the United States for this Circuit, and by the approval thereof by the Supreme Court of the United States—settled, by the almost unanimous concurrence of the members of the bar, and by the approbation of a large majority of the community—settled, in fine, by reason and truth, and by the universal harmony and adaptation to each other, of law and custom as co-existent in Spanish and Mexican countries. If, therefore, you hold the rule regarding the doctrine of *stare decisis*, as laid down in this very opinion, to be correct, you can no longer uphold the opinion itself.

§ 99. There is, however, one qualification of this rule as stated in the opinion, which must meet with the unqualified condemnation of every legal mind. I would respectfully ask, what is meant by qualifying the rule with the condition of “universally acquiesced in.” Does the opinion mean to be understood as saying, that a principle recognized by this Court, and carried into a decision, must be “universally acquiesced in,” to be binding? If so, then the Court, before pronouncing its decision, must always cautiously feel the popular pulse, to ascertain whether its contemplated decision will be “universally acquiesced in”—because, according to the qualification, the decision must be *universally acquiesced in*, to attain the force of the rule of *stare decisis*. I would respectfully ask, if the opinion was framed upon any such hypothesis? If it overruled *Woodworth vs. Fulton*, because it supposed that decision was not “universally acquiesced in?” and if it interpolated its new doctrine of presumption, upon the condition, and with the expectation, that it would be “universally acquiesced in?” If so, it should now be abandoned, for, instead of being “universally acquiesced in,” it is universally discarded as law.

§ 100. I think, however, it will be found, on an examination of the cases, that this Court has not paid much respect to the doctrine of *stare decisis*. In fact, to speak in plain terms, the doctrine is entirely exploded by the Court; and the consequence is, that people lack confidence in the permanency of any line of decisions which the Court may adopt;

and confidence will never be restored until the Court shows, by a return to the original starting point, that they are determined to adhere to the doctrine of *stare decisis*.

§ 101. What, then, is the position of the Court in relation to the doctrine of *stare decisis*? The cases show it to be this—so long as the same judges remain on the bench, the principle is adhered to. When the judges change, the law changes likewise. I shall prove this to be the rule of the Court, by a reference to adjudicated cases.

§ 102. We have already seen what respect was paid to the doctrine of *stare decisis*, by this opinion, in *Cohas vs. Raisin*—in which, it was held in such contempt, that the Court, apparently to avoid recognizing it, as it would have been obliged to, by deciding the case upon the law applicable to the facts, permitted a new state of facts to be substituted in the place of that contained in the record—thus, going far out of their direct way, for no other purpose, as it would seem, than to show their disapprobation of the doctrine. This same disposition of the Court will be made more clear, by a citation of other authorities.

§ 103. In *Rogers vs. Huie* (1 Cal. Rep., 429), it had been decided that an auctioneer, who receives and sells stolen property, though innocently, and in the ordinary course of his business, was liable to the true owner for the conversion, although the auctioneer had paid over to the felon the money received on the sale of the goods, before notice that the goods had been stolen. The Court say, "An auctioneer who receives and sells stolen property, is liable for the conversion to the same extent as any other merchant or individual. This is so both upon principle and authority. Upon principle, there is no reason why he should be exempted from liability. The person to whom he sells, and who has paid the amount of the purchase money, would be compelled to deliver the property to the true owner, or pay him its full value; and there is no more hardship in requiring the auctioneer to account for the value of the goods, than there would be in compelling the right owner to lose them, or the

purchaser from the auctioneer to pay for them. As a general rule, any person who assumes and exercises a control over the property of another, without right or authority, must respond in damages to the amount of the property; and I see no principle of policy for the encouragement of trade, or for convenience in the transaction of commercial business, under which an auctioneer should be permitted to claim exemption from the general rule.

“Upon authority the case is clear. The very point was decided in *Hoffman vs. Cadrew*, (20 Wend. 21; and S. C. 22 Wend. 285). That case is in all respects analagous to the case at bar, and both the Supreme Court and the Court of Errors held the auctioneer liable. Senator Verplanck, in the Court of Errors, (22 Wend. 319) speaking of the policy of the rule, uses the following language: “In this instance, the ruin falls hardly upon innocent and honorable men; but looking to general considerations of legal policy, I cannot conceive a more salutary regulation than that of obliging the auctioneer to look well to the title of the goods which he sells, and in case of feloniously obtained property, to hold him responsible to the buyer or the true owner, as the one or the other may happen to suffer. Were our law otherwise in this respect, it would afford a facility for the sale of stolen or feloniously obtained goods, which could be remedied in no way so effectually as by a statute regulating sales at auction, on the principles of the law as we now hold it.”

§ 104. This same question arose again in *Rogers vs. Huie*, (2 Cal. Rep., 571) before new judges on the bench. So little regard was paid to the doctrine of *stare decisis*, that the Court does not even condescend to notice the prior decision. The doctrine of the former decision was overruled, and it was held that the auctioneer was not liable. The opinion of the Court was delivered by the same justice, from whom the opinion in *Cohas vs. Raisin* proceeded, and it will be found, on examination, to partake largely of the same qualities which distinguishes the latter. After stating the point to be determined, it proceeds as follows:

“The question to be here decided is, whether an auctioneer, who, in the regular course of his business, receives and sells stolen goods, and pays over the proceeds of sale to the felon, without notice that the goods were stolen, is liable to the true owner as for a conversion.

“The only case precisely similar to this, is *Hoffman et. al. vs. Carew*, 22 Wendell. That case was decided by the New York Court of Errors, composed then of the Chancellor and Senate, and upon the question there was a dissenting opinion and a divided vote. The majority of the Court held that the auctioneer was liable. The opinions are long, and there is much argument placed on the ground of convenience. To this it can very briefly be replied, that there is as much, or more of that species of reasoning deduced on the other side, and which will occur readily to any one who considers the subject. The chancellor commences his opinion thus: ‘The simple question presented for our decision in this case, is whether the purchaser of stolen goods, who afterwards sells them as his own to a bona fide purchaser, is liable to the owner of the goods in an action of trover for such conversion thereof to his own use.’

“It will be seen at one view that he mis-states the facts in calling the auctioneer ‘the purchaser,’ and he is guilty of *petitio principii* in styling the act of the auctioneer ‘a conversion thereof to his own use,’ because the very point to be decided was whether it was conversion or not. And as that is also the point to be here decided, it will only be necessary to examine the doctrine of conversion as expounded by writers upon the action of trover. The conversion, it will be conceded, is the gist of the action, and without conversion, neither possession of the property, negligence, or misfortune, will enable the action to be maintained. In illustration of this, it is settled that a bailee is not liable in trover, where the goods have been lost or stolen, for there is no actual conversion. Stephens says trover is a remedy to recover the value of personal chattels wrongfully converted by another to his own use. Chitty says, ‘The refusal to deliver goods upon demand, will not, in all cases, constitute a conversion, unless the party refusing have it in his power to deliver up the goods detained.’ 1 Chitty, 160.

“Lord Mansfield says in a case quoted 3 Stephen’s N. P., ‘A mere wrongful asportation of a chattel does not amount to a conversion, unless the taking or detention of the chattel is with intent to convert it to the taker’s own use, or that of some third person, or unless the act done has the effect of

destroying or changing the quality of the chattel.' I have thus quoted enough to show the doctrine of the law as it is laid down by the most approved authorities.

"From these it appears to me that to be guilty, the defendant must have converted the property to his own use; and if not, then any other act to amount to a conversion, must be done with a wrongful intent, either expressed or implied. If one destroys a chattel wantonly, this is a wrongful intent expressed. In the case of a common carrier, who delivers goods by mistake to the wrong person, this is a wrongful intent implied, because his undertaking was absolute to deliver to the right owner.

"In the case under review, the defendant certainly did not convert to his own use; and it would be impossible to say that he was guilty of a wrongful intent expressed or implied, when it is clear that he had no notice of the rightful ownership of the property, and was in the regular pursuit of his business as a public auctioneer. He was the mere agent for the transmission of the property from one hand to another. Each act committed in connection with the goods, was not his act but that of his employer. And, although he might be liable to the vendee if he did not at the sale disclose his principal, yet that liability would arise from a different doctrine entirely."

§ 105. I regret that it does not fall properly within the scope of my argument, to notice this reasoning at length. I cite the case merely to show to what extent the Court acts upon the doctrine of *stare decisis*; and I have quoted from the opinion more than was, perhaps, absolutely necessary for that purpose, on account of the profound knowledge displayed of the principles of the action of trover, and the ease and grace with which the reasoning of Chancellor Walworth is brushed away with a *petitio principii*. The opinion concludes with an expression of satisfaction, "that the decision in *Hoffman vs. Carew*, is not law," and the former decision of this Court in *Rogers vs. Huie*, shares the same fate; but, it will be noticed that they are both clearly law within the very rule laid down by Lord Mansfield in the passage quoted.

§ 106. In *Bryant vs. Mead*, (1 Cal. Rep. 446) the Court held that money lost in gambling could not be recovered by the winning party, and that this was so at common law. In

Haight vs. Joyce, (2 Cal. Rep. 66) the decision in *Bryant vs. Mead* is doubted, and the Court say they should be inclined to question it.

§ 107. In *Heath vs. Lent*, (1 Cal. Rep. 410) it was held, in an action on a bond given on the issuing of an attachment, that counsel fees paid by the attachment debtor *in the defence of the suit commenced* by the writ of attachment, over and above the taxable costs, were not recoverable. But, in *Ah Thaie vs. Quan Wan & Kan Se*, (3 Cal. Rep. 216) it was held, in an action upon an injunction bond, to recover damages for the wrongful issuing of the writ, that the amount paid to counsel as a fee to procure the dissolution of the injunction, was properly allowed as part of the damages. It was insisted, on the argument in the latter case, that the Court had already decided in *Heath vs. Lent*, that counsel fees could not be recovered in such an action; but, with what sharp judicial acumen Mr. Justice Wells announces *ex cathedra*, "even though it may be said, that it (*Heath vs. Lent*) decides the point here, we question the correctness of the judgment of the Court in that case as it stands, and think it erroneous." The same learned judge, also, declares that a decision in Blackford's Reports, (*Davis vs. Cowre*, 7th Blackford) holding the same doctrine as *Heath vs. Lent*, did not meet with his approval; but the case of *Edwards vs. Bodine*, (11 Paige Ch. Rep.) meets with his full approbation. Now, there is not one word in the case cited from Paige's Reports, which conflicts with the decision in *Heath vs. Lent*, nor was there anything whatever in the case of *Thaie vs. Wan*, which called for the expression of an opinion as to the case of *Heath vs. Lent*. The same learned justice, however, who delivered the opinion in *Cohas vs. Raisin*, not satisfied, as it would appear, with the emphatic condemnation of *Heath vs. Lent* by his associate, lifts his arm against it, and deals it, as he no doubt, supposed, its death blow. Listen: "Generally, the recovery of counsel fees is not allowed as part of the damages, and the reason given for it is, because the loss is consequential, and not the actual and direct injury complained of.

“ But where, as in this case, the injury complained of is the improper commencement and prosecution of a writ, or of any process in a suit, the counsel fees in such case is a loss as immediate and direct as any other, and should be allowed. Upon this principle, I think the case of *Heath vs. Lent*, 1 Cal. Rep. is not law.”

§ 108. I ask, under which of the two paragraphs in the last quotation, would counsel fees, *paid on the trial of a suit* commenced by attachment, fall? Would they come within the category of an “injury” caused by “the improper commencement and prosecution of a writ, or of any process in a suit?” if any one knows what is an “improper commencement and prosecution of a writ.” It will be noticed, as has been stated, that the question in *Heath vs. Lent*, was, not whether counsel fees, paid in *procuring the dissolution of an injunction*, could be recovered as in *Edwards vs. Bodine*, and in *Ah Thaie vs. Quan Wan*, but whether counsel fees paid *on the trial of the cause*, which was commenced by attachment, could be recovered in an action on the attachment bond. To state the case more clearly—an action is commenced by a writ of attachment—no application to discharge the attachment is made—the parties put in their respective pleadings—issue is joined—and the parties go to trial—on the trial the defendant procures the services of counsel—and the fees paid to such counsel constitute the item in dispute, in the action brought on the attachment bond. Now, will any lawyer pretend to say that such fees form any part of the damages recoverable in such action? The necessity for the services of counsel on the trial of the cause, no more result from the issuing of the attachment, than from the issuing of the summons—they are services required equally on the trial of every suit, by whatever writ or process the suit may have been commenced; but the damages properly recoverable in an action on an attachment bond or injunction bond, are such as result exclusively from the process. Suppose the writ of attachment should be discharged immediately after the commencement of the suit, but the cause should go on to trial—would counsel fees, paid on such

trial, be recoverable in an action on the bond? That will not be claimed. No more are they recoverable in such a case, as *Heath vs. Lent*. The two cases, in fact, of *Heath vs. Lent* and *Ah Thaie vs. Quan Wan*, are so entirely dissimilar, that it would seem, nothing but a disposition to indulge an extraordinary judicial indignation, could call for any expression in the latter as to the correctness or incorrectness of the former. This opinion in the case of *Quan Wan*, goes as far out of the way to demolish *Heath vs. Lent*, as that in *Cohas vs. Raisin* did to sustain the validity of alcalde's grants, and is a striking commentary on that portion of the opinion in the latter case, which proclaims "a great regard for the doctrine of *stare decisis*."

§ 109. In *Hoen vs. Simmons*, (1 Cal. Rep. 119,) the Court decided that a naked parol conveyance of lands, unaccompanied by the delivery of possession, or title deeds, or other symbol, or circumstance, was null and void by the Spanish and Mexican law, as it would be under English and American law. This, I take the liberty of asserting, will not be denied or doubted by any Spanish or Mexican lawyer. But, in *Hayes vs. Bona, et al.* decided at the January term, 1857, the Court intimates its doubts as to the correctness of the position, but afterwards, in effect, holds the same thing. The Court says, "In *Hoen vs. Simmons*, (1 Cal. Rep. 122,) this Court held that a verbal sale of land was not valid under the Mexican law. As a general proposition, it may be stated that, under the Spanish law, a sale of real estate by parol would not be void, *per se*, and that the distinction between parol contracts and specialities, known to the common law, does not exist under the civil law, or the Mexican system of jurisprudence heretofore in force." The same opinion also says,—“But so far as we are informed, contracts for the sale of land by the custom of the country, were required to be in writing, and although all the forms prescribed were not strictly followed, still it was necessary that the instrument should contain at least the names of the parties, the thing sold, the date of the transfer, and the price paid.” The Court, it is true, makes

a distinction between the law as written, and that established by custom, yet the law has the same binding efficacy, whether existing in written enactments or by custom ; and, although the defendants claimed under a written contract, yet, as it was not signed by the party purporting to make the grant, nor by his direction or order, the sale set up, if any, was a verbal sale, which the Court correctly holds to be invalid ; thus affirming, in effect, the decision in *Hoen vs. Simmons*, which it had, at first, questioned.

§ 110. Other cases of a like character and complexion might be cited, but I have already called the attention of the Court to a sufficient number, to show in what light the doctrine of *stare decisis* had been viewed ; and how far the Court has gone out of the way for the purpose of signifying to what extent it considered itself bound by former decisions. Thus, in *Hayes vs. Bona*, the Court very properly decides that a parol conveyance of lands is void under the Mexican law—but it, in effect, expresses its unwillingness that a former decision, holding the same doctrine, should be considered as correctly declaring the law. In the case of *Quan Wan*, the Court passes upon the demerits of *Heath vs. Lent*, upon the ground of no closer analogy than that of the term “counsel fees” occurring in each. The Court, having in *Heath vs. Joyce* entered its protest against the decision in *Bryant vs. Mead*, finds itself, afterwards, at liberty to affirm the same doctrine in *Graham vs. Neville*, (2 Cal. Rep. 81.) In *Rogers vs. Huie*, (2 Cal. Rep. 571,) the Court violates principle, and overthrows the authority of the decisions, both of the Supreme Court and Court for the correction of errors of the State of New York, for no other purpose, as it would seem, than to run against the doctrine of *stare decisis*, by which it would have been bound in following the former decision of this Court on the same point. And in that master-piece of judicial science, the opinion in *Cohas vs. Raisin*, the whole system of Spain and Mexico, in relation to the organization of towns, is misconceived or misrepresented in manifesting the great regard for the doctrine of *stare decisis*.

§ 111. From this review of the cases in which the Court has given a judicial explanation of its position with regard to the rule now under consideration, it will hardly be claimed with seriousness, that the Court is precluded from questioning the correctness of the reasoning on which *Cohas vs. Raisin* was decided. I do not ask it to *reverse the case*, but to cease following the opinion—the judgment of the Court upon the facts in the case, and the reasoning, which precedes that judgment, being as wide asunder as the poles. If the Court has authority to reverse its own previous decision, when based upon reasoning applicable to the facts, how much more may it refuse to be bound by a particular process of reasoning wholly irrelevant to the facts? And if it may overrule a former adjudication of the Court, which is in conformity with law, how much more may it overrule one which violates all law? If the Court, in 1853, imagined itself justified in overruling the case of *Woodworth vs. Fulton*, which is now known to have been decided in strict conformity with law, how much more would it be justified, at the present time, in overruling the opinion in *Cohas vs. Raisin*, which is now known to be against all law? Upon what ground is the Court precluded from questioning this opinion? All I ask is that it may be questioned—for to doubt, is to examine, and to examine this opinion, is to discern and condemn its fallacy. It cannot be on the ground of *stare decisis*—for the doctrine of the Court favors, instead of opposing. It cannot be on the ground of the number of times, which that opinion has since been upheld by subsequent cases—for *Woodworth vs. Fulton* was sanctioned by as many subsequent judgments of the Court. It cannot be on account of the length of time, during which it has been followed—for it has been followed only some three years and a half, while the principle of *Woodworth vs. Fulton* was acted upon nearly four years. It cannot be on the ground that great interests have grown up on the faith of its continuing—for equally great, in fact, greater interests grew up under the decision of *Woodworth vs. Fulton*. And for good reasons—because the latter was proved, on examination, to

be founded on a correct understanding of the Spanish and Mexican law, and, wherever that law was understood, "every body could assuredly rest" upon it—while the former was found, on such examination, to be neither law, logic nor sense, and consequently, commanded neither the credit nor the respect of the community, but introduced a state of *chaos and a feeling of uncertainty* in respect to all titles to land—and because every man of ordinary information, has constantly seen and felt, as the whole community now does, that the time would eventually come, when, the emergency having passed which was supposed to have called it into being—when it should no longer be thought necessary, "certainly to demonstrate," that what any one "wished and believed to be his, actually was his"—it would meet the usual fate of all portentous births. Neither can it be, that the Court is shut out from an examination of this opinion, on the ground that it meets the approbation of other Courts, for it has, as we have seen, been discarded by all Courts—nor, on the ground, that it receives the commendation of the profession, for, from this source it meets with nothing but derision and scorn. It cannot be on the ground of its own force of reasoning. I will not insult the good sense of the Court by supposing it. Nor on the ground that its author has repeatedly declared it to be law—for you may pile error upon error, "Olympus high," without producing a truth, as you may add cipher to cipher forever, without making an unit. There is no ground upon which the Court can be prevented from the exercise of its own reason and sense, in the scrutiny of this opinion, unless it be that it operates, as, viewed in the light of subsequent interpretation, one would suppose it to have been intended, as a legislative grant of the lands mentioned in it, to the city of San Francisco, as such grant was considered by many to be "something essentially wanting." It, indeed, required an "effective judiciary" to accomplish so difficult a task. But it is not necessary for me to remind the Court that the "judiciary" does not sit to legislate, but to judge—not to exercise its "care and consideration in the construction of a legal code," but to construe the

code already made—not to create rights, but to protect such as are created—not to make grants, but to interpret such as are made—not to carry into adjudications, what it may conceive should be, but what is—not to take its own wishes, nor the popular feeling, but the law, as its guide—not “certainly to demonstrate” that what a man “wished and believed to be his, actually was his”—but to adjudge to each one what the law declared was his.—Because “no man has aught,” is it the business of this Court to give him aught? or, because he “thinks he has a title,” to bestow upon him a title? It would seem that a person who should suppose that any “judiciary has afforded the most substantial benefits,” by acting upon such principles, would not be commended for his correct appreciation of the true duties or proper sphere of action of the *judiciary*; and it would not be surprising, if a member of the judiciary should unfortunately entertain such notions of his duties, that he would fall into a train of reasoning like that of the opinion in *Cohas vs. Raisin*.

§ 112. Policy then is the only ground left, upon which the Court can hesitate as to its course. But true policy is as much against the opinion, as reason and law. Under the law as expounded in *Woodworth vs. Fulton*, the city of San Francisco, instead of being bankrupt and poverty stricken, would have become the owner of a domain which would be sufficient to defray all her expenses through all time—build her school houses, and public works—adorn her plazas and streets—support her hospitals and other works of charity—construct docks, piers and warehouses; in fine, endow her with a noble and magnificent patrimony, which, if managed with prudence and care, would obviate the necessity of taxation forever. On the contrary, what is the result, under the policy of the opinion in *Cohas vs. Raisin*? All the vast resources of the city have been “swept away,”—in their stead, is left an immense public debt, without the means of payment, otherwise than by heavy taxation—with the necessity of a regular continuance of taxation, in the future, to carry on her ordinary government—a bankrupt treasury, and no means of replen-

ishing it—streets unrepaired—public buildings unconstructed. These are “single points,” on which she, or “anybody can assuredly rest.” These are the “substantial benefits” which the latter decision has “afforded.” And for the profit of whom? Worthless demagogues and unprincipled speculators. To these it “certainly demonstrates,” that what each “wished and believed to be his, actually was his.” I ask again, ought such an opinion to be longer sustained by this Court? I will conclude what I have to say in direct reference to the opinion in *Cohas vs. Raisin*, with the oft repeated remark, how dangerous it is, for a person to endeavor to show himself wiser than others upon a subject of which he is entirely ignorant, both as respects the law and the language, and, afterwards, make his own folly a matter of “self-gratulation.”

§ 113. I have said the opinion in *Cohas vs. Raisin* was in direct hostility to the entire system of Spanish and Mexican law, upon the subject of which it treats. I shall now prove it. I shall now prove and make clear, by reference to laws and authorities of Spain and Mexico;

That towns, pueblos, cities, villages, and hamlets, in Spain and Mexico, as in all Spanish countries, and, I might add, in all countries in the world, enjoy the rights, privileges, franchises and property, which have been specially conceded by the sovereign authority, and, that, although by some general laws, the mere fact of their *corporate* existence may entitle them to certain political rights, such as to have a local municipal government, yet, in respect to property, real or personal, they own only such as has been expressly granted to them, or which has been acquired by purchase or some other lawful title, in the same manner and subject to the same laws as individuals; and that the formation of ayuntamientos, the election or appointment of *alcaldes*, and other officers, the establishment of limits or boundaries of towns, &c., has nothing to do with property; and, that all real property included within such limits belongs to the same proprietor, after, the same as before, they were established—

that is to say, the sovereign authority, unless it can be shown that such sovereignty has transferred the property.

§ 114. Let us understand what is meant by the term *pueblo*, as the subject in dispute more nearly concerns that particular class of towns, than the others mentioned. What then is a *pueblo*? Simply a *settlement, a collection of people, a town*. The term *pueblo*, in the Spanish and Mexican law and language, means nothing more than is meant in English by the words, town, village, hamlet, and no more implies, *ex vi termini*, the ownership of lands or other property in Spanish law, than the latter terms imply the ownership of lands in English law. The meaning is very correctly given by Mr. Com'r Thompson in his opinion in the case of the city claim. He says,

“The Spanish word ‘*pueblo*’ means, in its original signification, the people or population generally; it also means the inhabitants of a particular place, but in its more restricted signification, it means a *town or village, or any collection of persons residing in the same place*, and corresponds to our general term *town, as applied to similar collections of houses and people, whether of greater or less extent*. This last is the sense in which the word is used in the various laws and official documents to which reference will be made in the course of this examination.”

§ 115. I would observe in the outset, that the Novissima Recopilacion, which is cited in the opinion in *Cohas vs. Raisin* as authority, and, in truth, is the only Spanish code cited, was never ordered to be observed in New Spain, nor was ever adopted by the legislative authority of Mexico since the establishment of that republic, and is not regarded as an authoritative code in the latter country. Consequently, nothing is to be considered as law, for the reason that it is found in that code, but, to determine the force and effect of any law found in it, it must be referred to its origin. I would also observe that, the distinction which exists between an executive regulation and a *law*, must be borne in mind. The executive can provide by REGULATION only for the execution of the *law*. He can go no further than he has au-

thority from the proper legislative power. Neither can the governor of a territory or department, nor the departmental nor territorial junta make any order or decree, further than the authority delegated to them empowers them. If they do, their acts are invalid, and neither the judicial nor administrative departments are under any obligation to obey them. (*Lares, Derecho Administrativo*, p. 19.)

§ 116. A brief historical notice will, not inappropriately, commence this portion of my argument. As a result of the invasion of the Moors, the dominions of the king of Spain had been reduced to the mountains of the Asturias. Efforts were, thereafter, constantly made to reconquer the country, and of the lands acquired by almost continual hostilities, the king retained a portion to himself, while he divided the balance among the chiefs and nobles who had assisted him. By degrees, as this system of distribution, occasioned by circumstances, extended with the increasing extent of conquests, the principle became established, that the king was to be considered as partaking of two characters—the one, as the particular lord of that portion of the conquered lands and people, which he retained as his own private patrimony, in which respect, he was on a footing of equality with the other lords, in regard to their respective estates—the other, as universal lord (*Señor*) of the kingdom, or sovereign, in which character he commanded the subordinate lords and governed the kingdom.

§ 117. Some centuries passed away in this manner, during which an extensive tract of country had been re-conquered, and partially filled with Spanish inhabitants, and numerous settlements or pueblos had been formed, of people clustering together, of a larger or smaller size, some of them springing up on the lands of the king, some of them on the lands of the nobles—all of them, however, remaining without any municipal government, and being, in this respect, analogous to our villages before receiving an act of incorporation. That is, in this stage of their existence, the pueblos were governed by, and were subject to, the general laws and officers of the land.

and such laws and officers alone, and had no distinct laws or separate officers. But lands were distributed or allotted, or given by the king, not only to members of the nobility, but also to high ecclesiastics, and, after their establishment, to the masters of the several military orders, and settlements or pueblos grew up on their lands the same as on the lands of the king and nobility, and, in like manner, without distinct municipal laws or separate officers. Besides these, there were the *behetrias*, or pueblos formed of foreign emigrants, whom the sovereign had invited to settle districts, (*comarcas*,) giving them the right to choose their own lord, to whom they were to be subject during his life. There was also a fourth species called *abadengo*, which was a portion of the signiory royal in certain pueblos which the kings ceded to churches, monasteries, and prelates.

§ 118. In the eleventh century, Alonzo V., desiring to give more regularity and solemnity to the political and judicial administration, called together the council or *cortes*, and promulgated certain special laws called the *fuero* (law or franchise,) of *Leon*, among others of a general nature for the whole kingdom. In this *fuero* or franchise, which is the most ancient, properly so called, are comprehended some thirty laws considered as municipal, inasmuch as their observance was restricted to the city of *Leon* and its *termino* or *alfoz*, the district over which the jurisdiction of the municipal government was extended. From that source, and at that time, the municipal system took its origin. Thence forward, date the *fueros*, (special franchises, laws, or *charters*,) which were successively granted to numerous pueblos, as to Najera by Sancho the elder of Navarra, to *Sepulveda*, *Logrono*, and *Sahagun*, by Don Alonzo VI., to Jaca by Don Sancho Ramirez, to Toledo by Don Alonzo VII. Following the example of the sovereign, various particular lords procured *fueros* for their respective pueblos from the kings; as the lords, though the owners of the soil, and possessed of judicial and administrative jurisdiction over the people thereon, had no legislative authority, and could not, of themselves, confer any special legal or po-

litical privileges on the pueblos within the limits of their respective domains. (The authorities for the above historical sketch are "*Leyes Fundamentales de la Monarquía Española*, by R. P. Fr. Maguín Ferrer, pages 146-7, vol. 1, and note 2 to Title 8, Lib. 1, *Fuero Viejo de Castilla*, by Asso y Manuel, and the "*adiciones*" to the preliminary discourse to this code by Pedro José Pidal.)

§ 119. It is a necessary deduction from the foregoing brief sketch, that pueblos or settlements, at their origin and for some centuries after, had no rights, political, judicial, or of property, greater than, the mass of their fellow citizens—and that they commenced acquiring additional privileges by receiving from the sovereign *fueros* or franchises—and that whatever property they acquired, must have been acquired by them from the former owner, the same as by any natural person. If the *pueblo* had grown up on the land still retained by the sovereign, he might, at the same time he granted a *fuero*, transfer to the *pueblo* such portions of land as he deemed proper, or none at all. But if the *pueblo* had sprung up on the land which had been allotted to one of the lords, the sovereign could not, when he granted the *fuero*, convey any right whatever to any lands—but then, it was necessary to procure it by grant from the lord, the owner thereof. On the other hand, though the lord might bestow upon a settlement or pueblo on his lands, the title to a portion of the soil, it was beyond his power, as has been stated, to give to the settlement a corporate existence; for, it was a well settled principle of law, that no corporation of any class, municipal or otherwise, could be formed, without *express royal license and authority*. (See *Instituciones del Derecho Público General de España*, vol. 1, p. 273.)

§ 120. Thus, the rights, privileges, exemptions and franchises of all the settlements or pueblos, whether formed on lands of the lords or of the king, whether *Realengos*, *Behetrias*, or *abodengos*, depended in each case on the express concessions made by the sovereign, or by his command, or with his subsequent approval or confirmation, in the *fuero* or *charter*, or

Cartas Publicas, and were not uniformly the same in all the *pueblos*, but varied according to the terms of their respective charters—while, whatever land the *pueblo* acquired, if any, and whatever rights, or privileges the inhabitants enjoyed in the use of the lands within their limits, were acquired from the owner of the soil, in some cases the king, in others, the lords. Neither were all the *pueblos* or towns—of which there were many classes and grades—bodies corporate; but many, indeed the greater number of them, in the first stages of their growth, and until they had acquired a considerable population, were destitute of any jurisdiction or independent rights, privileges, exemptions, or property, and were subject to the jurisdiction and government of some other corporate *villa*, or city, within whose *termino*, *alfoz*, or *demarcacion*, they were situated; for, in many cases, the boundaries of a *pueblo*, *villa*, or city included a large extent of territory, over which it exercised jurisdiction and control, and as the population increased and became more dense, other and smaller *pueblos* grew up in various localities within its *termino* or *alfoz*, which were subject to the government of the original *pueblo*, without possessing or enjoying any municipal rights, or rights to property real or personal.

§ 121. By the *termino* of a *pueblo*, town, *villa*, or city, is understood the territory, district or jurisdictional domain assigned to it by the sovereign in the *fuero*, charter or *cartas publicas* of incorporation, and the inhabitants thereof enjoyed the right in common to the wood, water, pasturage, and natural products of the whole *termino* assigned to it—though the entire *termino* still continued to form part of the public domain, except in so far as the sovereign, by letters patent, had parted with his right thereto. Don Vizcaino Perez, advocate of the Royal Council, in the work entitled “*Compendio del Derecho Publico y Comun de Espana*,” whose definition of the term *termino* I have just given, speaking of the formation of towns in general, after having observed that in Spain they cannot be formed without royal license, says: “These unions of inhabitants have different names; some are called *aldeas*,

lugares, arrabales, pagos, villas, ciudades; and all these *poblaciones*, (pueblos or towns,) take their title conformably to the *privilegios de poblacion*, which the sovereign concedes to each one; (vol. 1. p. 331;) and, speaking of the *villa*, or incorporated pueblo or town, which possesses jurisdiction and control, and exercises government over all included within its *termino*, he lays it down as a principle, “that the king or sovereign prince alone has authority to grant privileges, (*privilegios*) or titles, to *villas*, or to constitute any *lugar* such, and no other can do it, though he be owner of the territory, (*dueño de territorio*,”) and, on the other hand, the king himself, though he may concede such title and privileges, can confer no right to the soil, nor make a grant of any portion thereof to the *villa* or other town, unless he be the owner (*dueño*) thereof. These charters and royal concessions of every name and nature, after having been first signed by the sovereign himself, were next recorded, word for word, and then sealed by the chancellor; and by the laws of Spain and the Indies, this registry was essential—the charter or concession not only being *incomplete*, but being declared to be *null* and *void* without it. (L. 1, tit. 15, lib. 2, R.—L. 4 & 7, tit. 4, lib. 2, R. I.: L. 2, tit. 5, lib. 3, N. R.) and we find specified in detail in L. 3, tit. 8, lib. 2, O. R., which is L. 10, tit. 15, lib. 2, R., the fees to be paid to the *chancelleria* for sealing each of the various charters, privileges, grants, &c.

§ 122. We thus see in what manner, and from what source pueblos or towns, *villas*, cities, &c., obtained their charters, by which they were enabled to enjoy greater privileges than the mass of the population. I shall now proceed to cite some authorities in respect to their acquisition of property. The following language of D. Francisco Antonio de Elizondo, in his “*Practica Universal Forense*,” (vol. 5, p. 226) contains in more direct, concise. and unequivocal terms, the substance of the proposition, with which I commenced this branch of my argument; and if he, who was one of the most eminent of Spanish jurists, and a member of the Royal Council, in which subjects, affecting the rights and property of towns, were daily

discussed, may be supposed to have understood them, as well as any of us, it would scarcely be necessary to add anything further on this point. "*No hay casa alguna diputada por derecho para pertenencia de los pueblos mas que aquella, que o por privilegio de los principes, costumbre, o disposicion de los hombres entre si les esta concedido.*" THERE IS NOTHING DESIGNATED BY LAW AS BELONGING TO TOWNS, OTHER THAN THAT WHICH, BY ROYAL PRIVILEGE, CUSTOM, OR CONTRACT BETWEEN MAN AND MAN, MAY HAVE BEEN GRANTED TO THEM. To the same effect is Gregorio Lopez on L. 9, Tit. 28, P. 3. "The privileges of incorporation," (says Perez, Compendio del Derecho Publico y Comun de España (vol. 1, p. 332)," or town, are firstly to have defined *terminos*, the designation whereof is, in Spain, the exclusive prerogative of the sovereign;" and again, (p. 331) "the distribution of lands is made by authority of the king. They never pertained by right to those who occupy them, until the king has granted them," &c. "The kings," (says Elizondo, Practica Universal Forense, vol. 3, p. 107, the same passage being quoted in the opinion of Mr. Comr. Thompson, in the city case,) the fountains of jurisdictions, are *the owners of all the terminos situated in their kingdom*, and as such can *donate* them, *divide* or *restrict* them, the same being true of their *pastos*, *although the pueblos enjoy them*, it being presumed that they are conceded only so far as respects their use and administration, *the property remaining in the sovereigns themselves*, so that they may limit them afterwards, enlarge or restrict them, or give any new form to the enjoyment thereof, and hence it is that the *pueblos* cannot alienate their *terminos* and *postos* without precedent royal license and authority." (See also, pages 108–112.) And again, in vol. 5, p. 226, he says, "although there be assigned to the towns, at the time of their constitution a territory and *pertinencias*, which may be common to all the residents without any one having the right to use them separately, it is a prerogative reserved to the princes to divide the *terminos* of the provinces and the *villas*, assigning to these the use and enjoyment, *but the dominion remaining in the sovereigns themselves.* And

again, (id.) "Upon the same principle of sovereignty the princes may alter, restrict, or enlarge the *terminos* once assigned to any town, giving them new form, or revoking the ancient, *without any pueblo whatever being able to acquire exclusive right to their pastos against the king, otherwise than by his special grant, or immemorial prescription.* And from these principles arises the justice of the incontrovertible practice in the recovery of lands called *realengos*, (royal lands) *so that, in cases of doubt, they are to be adjudged as such,* the princes having, in possessory and petitory suits, *their claim so far established, that the possessor must be required to exhibit his title, and not doing so, the lands are deemed to belong to the royal patrimony.*" The same author says that the *pueblos* had not the right to change the use of the lands within their limits from pasture to agriculture, without the precedent license and permission of the sovereign.

§ 123. Before proceeding further, let us ascertain what is meant by the *propios*, *rentas*, *arbitrios*, *solares valdios*, &c., of towns. The *solares* in newly founded towns in Spain, as well as in the New World, were small lots or parcels of land within the *terminos* of the town, intended for *repartimiento* or distribution among actual settlers, and specially assigned and set apart for that purpose. "Let the *solares* be distributed by lot to the *pobladores* or settlers, continuing from those which correspond to the *plaza mayor*, and let the rest remain for us to make grant thereof to those who shall afterwards come to settle, or whatever our pleasure may be." (L. 11, T. 7, Lib. 4, R. I.; see also, Tit. 17, Lib. 7, N. R.) What can be more clear than the language of this law for the purpose of showing that those lands continued to belong to the sovereign after they had been laid out and assigned as town lots for settlement? "The *propios*," says Febrero, "is that species of property which, by *some title*, pertains to the commonalty of each *pueblo*, and the revenues whereof are dedicated to the preservation of the civil state, and municipal establishment of the councils, comprehending likewise under this name, all those things declared to be such in virtue of any legal dispo-

sitions ; *arbitrios*, are certain duties, or taxes imposed by the supreme authority on articles of consumption, and commercial effects in those pueblos which have no *propios*, or in which they are so inconsiderable that they are insufficient to meet the necessities of the municipalities." According to Febrero, then, there may be pueblos "*which have no propios*," so that the ownership of *propios* does not form an element in the organization of a *pueblo*. Neither the towns themselves, nor the municipal authorities thereof, either in Spain or Mexico, or any part of the Indies, could *grant or alienate any property belonging to their propios or rentas, without precedent license from the government*, such license not being presumed by any lapse of time short of one hundred years. (Elizondo Practica Forense Universal, v. 5, p. 233 ; 1 Feb., Mej. 305 ; Law of March 20, 1837, Art. 9.) The Mexican law of March 20th, just cited, declares : "In cases of *necessity*, or for reasons of public convenience, they (the governors) may, with the previous consent of the departmental junta, grant license to the ayuntamiento or authorities charged with the administration of the funds (bienes) of *propios* and *arbitrios*, to alienate some part of such property, and *any grant, donation, or contract whatsoever, made without this requisite, shall be null and void*." Neither could the towns encumber them in any manner, (*id.*) nor were they subject to *incumbrance, seizure, or sale, by any judicial process*. (Delos Jurisprudence Generale, v. 3, p. 113 ; Dictionaire de Droit Normand, title Municipales.)

§ 124. The revenues (*rentas*) and *propios* in different cities and towns of Spain and Spanish America, consist in a great variety of productive property acquired at different periods and in different modes. Lots leased out on ground rent,—rural estates, stands and tables (or rather sites for them) rented out on the plazas, markets,—revenues arising from the supply of water for irrigations and family use by means of aqueducts, places and stalls in the *portales* around the plazas or public squares and in certain streets ; offices rented out to notaries and others in the *cabildo*, (city hall or town

house), dues collected for anchorage in some sea-ports, and many other things differing in each place, and depending always upon some title or express concession. An account rendered of the *propios*, of the city of Havana and of the city of Santiago de Cuba for the year 1830 and 1837, which will be found in a work entitled *Biblioteca de Legislacion Ultramarina* (v. 5, p. 215), will illustrate this remark.

§ 125. In the regulation on the subject of *propios* and *arbitrios* formed for the city of Mexico, in 1771, by Jose De Galvez, Visitor General of New Spain in pursuance of the king's command, it is declared in article 8, "among other revenues ought to be placed first in order that which is denominated of *propios*, and it consists of the shops and stalls of commerce, houses and appurtenances situate in the streets and lanes of Monterilla and S. Bernardo, in various annuities perpetual and redeemable, the pension paid by the contractors for the supply of meat, rent of tables in the slaughter house, the office of sealer of weights and measures of this capital, (which was vendible), and the towns of the arch-bishopric, and the income from the posts, and tables of the *plaza mayor*, the product whereof are destined to the payment of salaries, public works, charges, festivals, and generally the expenses of the ayuntamiento." (*Manuel de providencias economicas,—Politicas, para uso de los habitantes del Distrito Federal*, by Rodriguez, p. 173.) The revenue arising from the stands rented out on the plaza mayor, is declared to belong to the *propios* by virtue of an express royal concession (Art. 12) and so that arising from duties levied on wine, brandy, vinegar and other liquors, (id. Art. 12) as well as all the rest. By a royal *Cedula* of 30th Dec., 1694, the ayuntamiento was authorized to grant out lots on enfiteutic rent, and apply the revenues thence arising, to their *propios*. Thus the city of Mexico had continued from the conquest by Cortes, to the year 1694, more than a century and a half, before receiving the authority to grant lots on rent, and this authority was derived from the sovereign, instead of being a kind of necessary or implied authority co-existent with the first organization of that city as a Spanish town.

§ 126. Some cities, *villas* and *lugares* of the Indies, had concessions from the crown for a limited time, of the fines payable to the Royal Exchequer, which might be incurred within their jurisdiction, to be applied to their *propios*, as may be seen by reference to L. 9, T. 13, Lib. 4, R. I. By L. 1 of the same title and book, (of 1523) it is also provided that, "the viceroys and governors, who may be thereunto empowered (*qui tuvieren facultad*), shall assign to each *villa* and *lugar* which may be newly founded and settled, the land and lots (*solares*) which may be necessary, and can be given to it without prejudice to third persons, for *propios*, and make report to us of what has been assigned and given to each, in order that we order the same to be confirmed," (A. D. 1525). The viceroys and governors, not all—or any of them indifferently, but such as may have *authority* from the king, the legislative power, shall assign to each *new* town, not those already founded, but those which shall be newly settled, for the *propios* of the place, and consequently to be reserved from sale or distribution, the land and lots which may be necessary for that purpose, and make report thereof to us; not grant them, but advise us, so that we may grant them, or which is the same thing, order the designation made to be confirmed, by which act, the *title* would pass, qualified and limited, however, as in all such cases. By the law of 20th March, 1837, Art's 5, 65, 112, 113, 172, the fines imposed by the governors, prefects, sub-prefects and alcaldes, are to be applied to the *propios* of the place where the fined person resides.

§ 127. We see, therefore, that the *propios* and *revenues* of towns consist of a great variety of things acquired by express grant, and that the lands belonging to the *propios* are entirely distinct from the lots laid out for settlement and private occupancy, as well as from every other class of lands, which may be within the limits and jurisdiction of towns. They are the lands granted, designated, described and located for that specific purpose, without which location, boundaries or description, there can of course be no valid grant.

§ 128. We have already seen that by the laws of Spain, not only is it the exclusive prerogative of the king [or since 1812 of the *Cortes*] to grant the title of *villa* to any place, and to designate the *termino* or demarkation of its jurisdiction, but that all the rights, privileges, property and exemptions which it can claim, must be derived from the same source. The same principle is declared in the law of 1627, which is L. 6, T. 8, Lib. 4, R. I.

“We ordain that any viceroys, *audiencias*, governors, or other ministers of the Indies, however superior in authority, do not for any cause, or reason whatsoever, confer titles of cities, or *villas* upon any *pueblo* or *lugar* either of Spaniards, or Indians, nor exempt them from the jurisdiction of their principle *cabeceras*, with admonition that it will be matter for accusation in the account to be taken of their official conduct, for this *merced* [favor] and faculty must be petitioned for in our Council of the Indies, and we declare void those titles, which in contravention of this law shall be conferred upon any *pueblo* or *lugar* whatsoever; and in respect to the *new towns and settlements* [nuevas poblaciones y fundaciones] let the dispositions [of the law] be observed.”

This law is sixty-four years later in date than L. 2, T. 7, Lib. 4, R. I., and must be considered as modifying it, if any real conflict exists between them.

§ 129. We accordingly find that when it was proposed by the inhabitants of the *pueblo* of *Manzanillo* in Cuba, to establish local authorities at that place, erecting themselves into a separate municipality, the *expediente* formed for that purpose had to be passed to the Council of the Indies in order to obtain the royal sanction; and as the title which was granted will illustrate several matters which we have to consider, I will transcribe it at length,—the same having been cited and relied upon by Mr. Comr. Thompson in the case of the city claim.

“Don Ferdinando VII. by the grace of God, king, &c. In a letter of the 14th May of the year 1830, my Governor, Captain General of the Island of Cuba, reported to me the *expediente* formed at the instance D. Sabastian Romagoza, D. Pedro Olive, and D. Joaquin Clavelle, citizens of the new

town called Port Royal of the Manzanillo in the said Island, with the intent that there should be granted to it the title of city and *villa*, independent of that of Bayamo, (founded in 1515,) with the right to have a local government and sub-delegate of the royal *Hacienda*, Ayuntamiento and Public Notary; manifesting with that view its state of civilization, numerous inhabitants, commercial advantages, the inconvenience and disadvantage to which the citizens were subject, from having to go for the administration of justice by impassable roads, a distance of fourteen leagues to the *villa* of Bayamo, as likewise, the well known advantage arising from the advancement of the settlement of that part of the Island contiguous to foreign parts.

“In order to proceed with the exactness which was requisite in affairs of this nature, it was ordered on the 21st of October of the aforesaid year, 1830, that my Governor, Captain General should appoint a person, in his confidence, to proceed to the *apeo* (judicial survey,) and demarkation of the lands of said *Pueblo* of Manzanillo, designating those necessary for *proprios*, *ejidos*, *dehesa de labor*, (pasture land for working oxen and horses) and pasturage of cattle; that he should mark out with all possible exactitude the jurisdictional limits (*terreno jurisdiccional*) which were to be assigned to it and the *partidos* which it should embrace; that in defect of *proprios* he should propose the *arbitrios* which he might deem proper to cover the municipal expenses, for which purpose he was to form an *expediente* with citations of the owners of coterminous lands, or of those who might for any cause be presumed to have a right to be heard; that he should take proof of the exact number of souls in Manzanillo and of the neighboring *partidos*, which it might be proper to include in its jurisdiction; that he should select the edifice which ought to be set apart from the Council House (*casa de Ayuntamiento*) and prisons, or if there should be none suitable for the purpose, then of the land most suitable whereon to build them, forming plans, estimating the cost of the works, and proposing, at the same time, the means and *arbitrios* which he might think least burdensome to defray the expenses, without detriment to my royal *Hacienda*; that he should form the municipal ordinances which should govern *ad interim*, for which, and all else that he might deem necessary he should give audience to the inhabitants in a *Junta* composed of four or five of the best informed; proceeding in all things with the greatest dispatch, without any vexation or oppression of the inhabitants, and that he should report all with his *informe*. In pursuance

whereof, my Governor Captain General committed the execution of the aforesaid proceedings to the Lieutenant Colonel *D. Fulgencio De Salas*, who, as the result of his first investigation, manifested that the discharge of his commission was the work of a long time, and would occasion a delay much to be regretted in the indispensable separation of *Manzanillo* from the jurisdiction of Bayamo, which, without suspending the other measures, might be effected immediately, by designating for the division line of the *termino* and jurisdiction of Manzanillo that marked by the *Estero* and *Cienega del Buey*, river *Gicotea*, and river *Tarquino* as natural limits, closing the distance between the sources of the two rivers by two right lines, one extending from the *Gicotea* to the *Buey*, and the other from the *Tarquino*, by which demarkation, there remained in the new jurisdiction the *partidos* of *Yara*, *Gua*, and *Vicana*, leaving still in the jurisdiction of Bayamo, a territory much more extensive. Upon this exposition of the Commissioner *Salas*, my said Governor, (Captain General,) consulted with the superintendent, sub-delegate of my royal *Hacienda*, and both chiefs concurring in respect to the convenience and utility of the emancipation of *Manzanillo*, with the aforesaid demarkation, the former made report of all for the corresponding determination (of the king). The subject having been examined with all that mature deliberation which its importance exacted in my Council of the Indies, they acquainted me with their opinion in a *consulta* of the 5th June last, and conformably therewith, I have determined to concede the title of villa to the *pueblo* of Port Royal of *Manzanillo*, in the said Island of *Cuba*, with the said jurisdictional territory designated by the Commissioner *D. Fulgencio de Salas*, and the establishment of an *Ayuntamiento*, composed of two ordinary *Alcaldes*, which my Governor Captain General will appoint, for the first time, and six *regidores*, declaring these last offices vendible and renunciabile, with respect to which the *Intendente* will form an *expediente* and proceed conformably to the laws. Likewise, I have deemed meet to charge my said Governor, very particularly, that he take the necessary measures, to the end, that as soon as the *Ayuntamiento* be formed, it occupy itself in expediting, as much as possible, the proceedings commanded in the order of 21st October, 1830, at least, those which may take place most conveniently, and with the least expense, difficulty or delay, reserving to myself the prerogative to take measures for the appointment of sub-delegate of the four causes, (Justice, Police, War and *Hacienda*) in *Manzanillo*, whenever I may determine upon the *consulta* of my said Coun-

cil of the Indies, with respect to the establishment in the Island of Cuba, of *Alcaldes, Mayores Letrados* similar to what was done in Porto Rico, and considering that the advantages resulting from this concession are greater, with respect to the State than the citizens of Manzanillo, I have determined to declare it exempt from the services designated to those of this class in article 16 of the Royal Cedula of 3d Aug. 1801.

"In consequence, it is my will, that the said *pueblo* be perpetually styled and called *villa* of Port Royal, of Manzanillo, and as such use the jurisdiction corresponding to it with the possession of the pre-eminences which it may and ought to enjoy. Given in the Palace, 19th of August, 1833.

"I, THE KING."

§ 130. From this document several important conclusions are deducible in harmony with the laws and authorities before cited.

1. That no power short of the Sovereign, could erect a municipal corporation at Port Royal, give to the inhabitants a separate jurisdiction and local government, and segregate them from that of Bayamo, in whose *termino* they had been comprehended, though fourteen leagues (nearly 40 miles) distant from it. The Captain General of Cuba, though possessed of the *omnimodas facultades*, the plenary powers of the Viceroys, could not even take the initiatory steps, so as to create an inceptive right, but forwarded the *expediente* directly to the king, by whom the initiatory orders were given. This is a practical exposition of L. 6, T. 8, lib. 4, R. I., as late as 1830-3.

2. That a municipal corporation may be fully established with its *termino*, or jurisdictional limits marked out and defined, and its Ayuntamiento and other authorities fully installed, without giving that corporation any shadow of right to lands within its limits, or to any other property whatsoever. For, at the time when the king signed the charter for Port Royal, not only had no grant of lands been made to the town, but the lands had not been marked out under the orders which the Commissioner Salas had received for that purpose, but, to execute that part of the royal mandate, he had reported would be the work of a long time.

There must be an *apeo*, a technical expression well understood in law, meaning a judicial survey, with many indispensable formalities. An *expediente* must be formed—there must be indispensably a citation of *colindantes*, and “of all who, for any cause might be presumed to have a right to be heard.” Of course on a subject so immediately affecting the inhabitants, as the demarkation of lands for their *proprios*, *ejidos*, *dehesa de labor*, and *pastos* he must give them audience. All this, however, to be executed with that exactitude which is required in affairs of this nature, would require a long time, and was left undone, and, consequently, when Port Royal got its charter, it got no grant of land with it, and although it was probable that at some subsequent day, some of the lands within the extensive territory which its jurisdiction embraced, would be surveyed off, assigned and granted to it, yet, nothing is clearer, than that at the time of its incorporation, it had no lawful claim to any particular tract of land within the three *partidos* which it embraced. Manzanillo had been a *pueblo* for a long time with a numerous population and a considerable commerce, when it was erected into a corporate town or *villa*, but the question of *pueblo* or no *pueblo* was not agitated, it seems, as affecting the question of lands or property, and although L. 6, T. 5, Lib. 4, R. I. was in force in Cuba, nothing appears to have been suggested about *that four leagues square*, either by the inhabitants, the Commissioner Salas, or the Captain General, or by the learned Council of the Indies. The Commissioner was also required by the Royal Order of 21 Oct., 1830, to select the edifices for Council House and prison, or if there should be none suitable for the purpose, then the lands whereon to build them. These lands would of course be in the heart of the town and would be selected from some of the vacant or ungranted lots, the property of the king, and which, when selected, and reported to the king, he intended to grant to the town for the purposes indicated in the order. Had these lands been vested in the town from and by virtue of its establishment or incorporation, the Royal Commissioner would have nothing to do, but

the town would select for itself and make use of its own lands for any municipal purposes not forbidden by the laws.

§ 131. We have seen something of the nature of the terms *rentas*, *propios*, and *arbitrios*, as used in reference to towns in Spain. It may furnish additional help in obtaining correct notions to ascertain the character of the terms *ejidos* and *right of common*. The *ejido* is "the *campo*, (open country,) which is at the *salida* (exit) of the cities, *pueblos*, and *lugares*, and which is not planted nor cultivated. Its extension according to the law (L. 13, T. 7, Lib. 4 R. I.,) "ought to be as great as may be necessary, so that, in case the town grows, there will always remain space enough for the people to recreate themselves, and let out their cattle without doing damage. From which it is clear that no fixed rule can be given, but that it must be altogether arbitrary, according to the circumstances of the magnitude of the cities, number of inhabitants," &c., (1 Feb. Mej. 312-13.) The author just cited divides the *bienes de universidad* into two classes, in the first of which he ranks the *propios* and *arbitrios*, "which cannot be used by all, and which are only *administered* by the *ayuntamiento* or council of the city, and the fruits whereof are devoted to the public benefit;" (id. 304;) and in the second class, the *ejidos* (id. 312) "which are for the use in common of all the dwellers in the place, as well the poor as the rich, but which cannot be used by those of any other *tierra* (place or town) contrary to their will or prohibition." The *ejidos*, being nothing else than vacant space, left provisionally outside of the surveyed plat, might subsequently be divided in the same way as the original plat, by extending the streets and laying out of new *solares*, if the increase of the population should require it, but they never ceased to be the property of the sovereign (L. 1, 13, 14, Tit. 7, Lib. 4, R. I.)

§ 132. The *right of common*, that is, the common use and enjoyment, which the *vecinos* have in the *terminos publicos* and *consejiles* of the cities, *villas*, and *lugares*, was only a precarious servitude existing by sufferance in the royal lands remaining undisposed of, which did not impair the sovereign's

full and absolute property in the lands, nor prevent the free disposition thereof by him,—a right which was fully exercised by the Cortes of January 4th, 1813. The *terminos publicos* or *consejiles*, or the commons of towns, embraced all the public and vacant lands in Spain.

§ 133. The uniform policy was opposed to their alienation by the Crown, to whom the property therein appertained (L. 8, 9, 10, T. 21; L. 1, 2, 3, T. 23, and T. 24 and 5, Lib. 7, N. R.,) and this policy was affirmed in the most solemn form in the contract between king and people, known as *condicion de millones*, in which the representatives of the *pueblos* in the *cortes* granted to the crown the sum of seventeen millions in aid of its necessities (L. 2, T. 23, Lib. 7, N. R.,) and the sovereign promised for himself and successors not to sell vacant lands (*tierras valdias*) nor trees, nor the fruit thereof, and that the same should remain as theretofore to the common use and enjoyment.

§ 134. In America, shortly after its discovery and first settlement, the use and enjoyment of all the vacant public lands were declared to belong to the citizens in common (L. 5, 6, 7, 8, and 9, T. 17, Lib. 4, R. I.,) which are understood to be restricted in the same manner as in Spain to the citizens of the respective towns, within whose *termino* or demarkation the said public and vacant lands may exist, unless some special provisions have been made to the contrary as in L. 3, T. 8, Lib. 4, R. I., which ordains that “the Judiciary of the City of Mexico have jurisdiction, civil and criminal, within the fifteen leagues of the *termino* (fifteen leagues extended each way) but that the same be of *pasto comun* (common of pasturage) for all the citizens, dwellers, and settlers in New Spain, during such time as the same may be unoccupied with crops, as is provided in our laws and ordinances.” These laws and ordinances are the same as referred to above, viz: (L. 6,) “The lands and hereditaments whereof we shall make gift and sale in the Indies, the sown crop being removed, must remain for common of pasturage, (*pasto comun*,) except the *dehesas regales y consejiles*”—(L. 7.) “The *montes*, *pastos* and *aguas* of the

lugares, and the *montes* which shall be embraced in the *mercedes* which shall be made, or which we shall make of *significaries* in the Indies must be common for all the Spaniards and Indians, and we command the viceroys and *audiencias* that they cause this to be observed and fulfilled," (L. 8.) "Our will is to make, and by these presents we do make, the *montes* of rural fruit common, and every one may gather it and take away the *plantas* (trees planted) to set in his own lands"—(L. 5.) "We have ordained that the *pastos*, *aguas*, and *montes*, remain common in the Indies, and as some persons, without our authority, have occupied a large portion of territory and lands in which they do not allow any one to put *corral*, nor bring thither their flocks, we command that all the *pastos*, *montes* and *aguas* of the provinces of the Indies be common to all those who now or hereafter shall be *vecinos* thereof," &c. But this common use and servitude created by these general laws, and sustained during so many ages, did not restrict the sovereign's full and absolute property in those common lands of the *consejos* or *pueblos*, which, in the demarkation of limits, might be comprehended in their *terminos*, nor impair his right freely to dispose thereof.

§ 135. Although the laws contained in Titles 21, 22, 23, 24 and 25, Lib. 7, R., show that the general policy of the Spanish government was opposed to the alienation of the public lands, or their conversion to any other use than that of common of pasturage, they do not show nor contain any evidence whatever, that the towns or citizens thereof, individually or in common, *owned anything*, much less *any lands*, except such as had been *conveyed* to them by the sovereign or other proprietor. By the general and uniform policy of the Spanish government, it was deemed more advantageous that the royal lands should remain common and free for the poor and rich alike, in the several towns within whose demarkation they were situated, and that the citizens of the towns should be required to bestow their care and labor so far as necessary, in the preservation and reproduction of the timber, wood, and shrubbery upon them. In Art. 14 of the Royal

Ordinance of 1749, (L. 14, T. 24, Lib. 8, N. R.,) it is said: "It cannot be regarded as a burden upon the towns or the citizens thereof, that they are required to bestow labor in the preservation of the timber already grown, or to plant anew the woods and free lands, (*montes y tierras valdías*,) *although they be the property of his majesty*, because, besides being under obligation so to do, they enjoy the fruit thereof, with pasture and shelter for their cattle," by the increase of which, and the more abundant supply of wood, coal, meat, and provisions, their *propios* or private revenues would be augmented. (See also L. 22, Tit. 24, Lib. 7, N. R., Art. 26.) The king, however, frequently did make grants of lands within the *terminos* of the cities, *villas*, and *pueblos*, as may be seen in L. 2, T. 25, Lib. 7, N. R., but the grantees thereof were not allowed to exclude the citizens from the right of common, except during the time that the land should be occupied with sown crops—the *natural productions* remaining free to all, unless the grantee and owner of such lands was empowered by *royal privilege specially conceded* for that purpose, to enclose and occupy and enjoy the lands exclusively.

§ 136. The origin of this system of commons ascended even to the times of the Visigoths, who, occupying and distributing among themselves two-thirds of the conquered lands, and leaving one-third to the conquered inhabitants, had to abandon and leave without owners all those which the population, greatly diminished by the wars, was insufficient to occupy. To these lands was given the name of *campos vacantes*, and these for the most part constituted the Spanish *valdíos*. (See the "Informe of D. Gaspar Jovillanos on the Agrarian law, presented to the government on behalf of the '*Sociedad Patriótica*' of Madrid; also Escriche Dic. de Leg. Art. '*Baldíos*.'")

§ 137. The town commons in Spanish countries, were all the lands, public and private, embraced within the *termino* or demarkation of the municipality, except those which, by special authority from the sovereign, were *acotados* and *cerrados*. The decrees of the Spanish Cortes of Jan. 4th and June 8th, 1813, destroyed this whole system. The former author-

ized the sale and distribution of the royal lands in the towns, and the latter allowed individual owners to enclose and use their own lands to the exclusion of all others. There remained, after this, no commons to towns, which might not at any time be disposed of by the sovereign proprietor. The laws, which permitted the citizens to use the public lands in common, remained in force, but the ancient system, which proposed the reservation of them for this purpose, was abolished, and the lands were, in accordance with the new and wiser policy, to be reduced to private dominion as quickly as possible. (See report of Committee on Agriculture in the Spanish Cortes on this subject—12 *Diario de Cortes*, p. 99.) The utility of the measure had been well understood, and recommended by the most intelligent Spanish statesmen at different times; but, there was no period, until that between 1808 and 1813, when the old establishments were completely broken up, and Spanish society was reduced to its elements, when this law, fraught with such advantage to the country, could have obtained any general support.

§ 138. This law provides for the reduction to private ownership, of all the *Baldios* and other *terrenos comunes* (common lands,) or *terrenos realengos*, (royal lands,) for such they were, and also all those pertaining to the *propios* and *arbitrios* of towns, not only in the peninsula of Spain, but in the provinces beyond sea, except the *ejidos* necessary to the towns, (art. 1 of law of January 4, 1813.) They were all to be alienated, and the proceeds of one half were to be appropriated in payment of the national debt, (art. 6,)—a portion of the other half, was to be applied in reward of, and as a provision for the support of, the officers and soldiers of the army, (arts. 9 and 10,) and the remainder were to be distributed by way of *repartimiento* among the citizens of the respective towns, who might be destitute of landed property and who should petition therefor, (art. 15.) This law is, undoubtedly, treating of *lands in the towns*, which was the situation of all the lands in Spain; because, it is provided in article three, that, in the alienation of such lands, a preference shall be given to the

citizens and commoners of the *pueblos* in whose limits or jurisdictional domain they lie, and in article six it is declared, that, in the hypothecation of the half of the *baldios* and *realengos* of the monarchy, excepting the *ejidos*, which were royal lands also, a preference shall be given to those claims which may be held against the nation, by the citizens of those *pueblos* to which the lands appertain, and in article seventh, that, in the alienation, on account of the public debt, of this half of the *baldios y realengos*, or the part which it may be deemed necessary to hypothecate, a preference shall be given in the purchase to the citizens of the respective *pueblos* and the commoners who had been, up to that time, in the enjoyment of the lands.

§ 139. It was provided by article eleven of the law of 1813, mentioned in the last section, that the designation (*señalamiento*) of the *suertes* to officers and soldiers, and others, should be made by the constitutional *ayuntamientos* of the *pueblos* to which the lands appertained. This intervention of the *ayuntamientos*, in the designation of the lands, or in pointing them out and locating them, for all the various classes of claimants, as officers, soldiers, settlers, vendees, and public creditors wishing to receive lands in satisfaction of their claims, was only that which was delegated by the government to the subordinate political authority most competent, from their knowledge and position, to discharge the duties assigned to them, an intervention, which was given by L. 5, 6, & 8, tit. 12, lib. 4, R. I. in all cases of the *repartimiento* (free distribution,) of lands, but which, by no means, pertained to the *ayuntamientos* on the ground that the *pueblos* were the owners of such lands.

§ 140. We have, heretofore, seen by the references which have been made to express laws, to eminent writers on the fundamental laws of Spain, and to historical facts, showing when and how towns first became invested with their corporate rights, revenues, and property, that, in all Spanish countries, corporate towns can be erected by royal charter only, within the terms of which all their rights are restricted, and that this principle has been recognized and uniformly ap-

plied in practice, at all times, even from the foundation of the Spanish monarchy. And we have, also, seen, that towns have inherently, and from the bare fact of their organization, no property whatever, but that their claims to property are acquired in the same way, and are subject to the same laws, as those of individuals; and we have cited in support of this latter proposition numerous express authorities, and among the rest, that of Elizondo, who speaks, in view of all the legislation as applicable both to Spain and the Indies, and of the practice of the supreme council of the Indies as well as that of Castile, of which he was a member; and it will be remembered that these councils were the tribunals which had exclusive cognizance, in most cases, of the subjects treated of in the observations cited.

§ 141. Is the question asked, have towns, then, no property by virtue of their establishment, in Mexico and other Spanish countries—none but such as they acquire in the same mode as natural persons? I answer, none whatever. It was, no doubt, contemplated by the colonization laws of Spain and Mexico, that lands, for certain purposes, should be assigned to towns, and it is clearly contemplated by the same laws, that lands should be given to individuals. But in many, perhaps the majority of cases, both the one and the other are found destitute, because they did not get any grant from government, or because they had not the means to buy them, or, because they did not want them. How, then, do towns grow up in Spanish countries? In the same manner as in the United States—by the union and concentration of the population at some particular point—the establishment and natural increase of trade, commerce, and manufactures. Citizens who want dwelling-houses, stores, or shops, build them or buy them from the lawful owner. Those who want lots to build on, purchase or receive them by gift from the proprietor, whether he be the sovereign or some private person, and the property is not changed, in any manner, by the formation of the town, or its erection into a corporation. THERE IS NO SPANISH OR MEXICAN LAW OR AUTHORITY THAT EVER HAS

BEEN, OR EVER CAN BE ADDUCED IN REFUTATION OF THIS PROPOSITION.

§ 142. The royal regulation of October 24, 1781, made especially for California, provides,—(art. 4.) that “the *solares*, which may be granted to new *pobladores*, MUST BE ASSIGNED BY THE GOVERNMENT in the sites and with the extension corresponding to the situation of the land where the new *pueblos* may be established,” &c.—(art. 5,) that “the distribution, which shall be made of the said *suertes*, as well as of the *solares*, MUST BE MADE IN THE NAME OF THE KING OUR LORD, and shall be executed *by the government*, with equality and in proportion,” &c.,—and of the king’s *suertes* (*realengos*.) shall be set apart such as may appear suitable for the *propios* of the *pueblo*, and of the rest of the *suertes* GRANTS SHALL BE MADE BY THE GOVERNOR, IN THE NAME OF HIS MAJESTY, to those who newly come to settle, as *likewise of the respective solares*, and especially to soldiers, who having completed the time of their enlistment, or from their advanced age, may retire from the service, as well as to the families of such as may have died.” This is a commentary on the laws of the Indies, and the sovereign’s proprietary right to the lands in the towns, so clear and explicit as to seem as if it ought to satisfy any unprejudiced minds really desirous of arriving at the truth. But there are others.

§ 143. The following statement from one who was an eye witness of what he relates, will serve as a further elucidation of the subject :

“In order to give sustenance and stability to this spiritual conquest, the most Excellent Señor Viceroy gave in charge to the new Governor *D. Filipe Neve*, that he should procure to settle (*poblar*.) the country with some *pueblos* of Spanish people who should occupy themselves in the cultivation of the land) and the rearing of the cattle and beasts (horses and mules) which might serve for the maintenance of these acquisitions. And the said Señor, keeping in mind this superior order, having observed, when he came in sight of the royal presidio of this port, (of San Francisco,) the extensive plains in which the mission of Santa Clara is situated, the great extent of land which might be irrigated with the abundant waters of the river, named our Lady of *Guadalupe*, he assembled the

pobladores, who had come with the expedition from Sonora, and adding to them others, he assigned to them a site (*sitio*), and distributed lands for the formation of a *pueblo*, entitled of *San Jose de Guadalupe*, designating for the location (*ubicacion*,) thereof the place above the mission of Santa Clara, on the other side of the river named *Guadalupe*, towards its rise, three quarters of a league distant from the houses of the mission. In the said site (*sitio*,) the colonists (*colonos*,) formed their *pueblo*, giving a beginning thereto in the first days of November, 1777, to which other *vecinos* have been added, and all governed by an *alcalde* of the same *vecinos* subordinate to the Governor of the province, with a guard of three soldiers and one corporal, all resorting to the mission to hear mass. They maintain themselves with the crops, which they gather, of wheat, beans and Indian corn, and with the surplus which they sell to the troops they clothe themselves, for the same purpose, rearing large and small cattle in order to supply the troops, with horses." (*Palou* life and apostolic labors of Father Junipero, p. 225.)

"Here" says another writer "you have a *pueblo* fairly established by the Governor in person, acting under orders of the Viceroy who had to the same effect received his instructions from the king (vid same author, p. 63.) All that remained now to be done so far as regarded the *establishment* of the *Pueblo* was to make immediate report to the king according to L. 4, T. 1, Lib. 4, R. I. Yet this *Pueblo*, thus fairly established with its municipal government installed, had no lands nor anything it could call its own but the immortal honor of being the pioneer town in the most magnificent country in the universe. Five years afterwards the initiatory steps were taken in conformity with L. 1, T. 13, and L. 1, 13 and 14, T. 7, Lib. 4, R. I., and the royal instruction of 1781, in the designation of lands for *proprios* and *ejido* as well as for giving to the settlers formal titles for their respective allotments."

§ 144. The following is a brief sketch of the method of proceeding, in the designation of such lands.

Don Pedro Fages, Lieutenant Colonel of the regular army, and Governor of Old and New California, commissioned D. Jose Moraga, Lieutenant Commandant of the Presidio of San

Francisco, to proceed to the said Pueblo of San Jose, and "conformably with the instructions contained in the afore-said royal regulation, give possession, IN THE NAME OF HIS MAJESTY, (whom God preserve) to each one of the settlers, of the *suertes* and *solares*, which were destined for them," with instructions to form an *expediente* of his proceedings, and "*remit the same for confirmation, in order that this government in view thereof, may determine as may seem proper;*" and with further instruction that he should insert in the title papers giving possession, that such right of possession was subject to the "privileges, favors, and exceptions, WITH WHICH THE SOVEREIGN MAKES THE GRANT," &c. D. Jose Moraga, in execution of the duty assigned him, having commanded to appear before him witnesses to assist him, as well as "*the nine Pobladores of the said Pueblo,*" reported, "having all present, in the name of his majesty (whom God preserve) I gave possession of the respective *solar* thirty varas square for a dwelling house, to the Alcalde and settler Ignacio Archuleta, who was made acquainted therewith, and he said that he was aware of the privileges, favors, and exceptions, WITH WHICH THE SOVEREIGN MADE HIM THIS CONCESSION, under the penalties imposed on the disobedient," &c. And D. Jose Moraga further reported, that "the acts of giving possession of the *solares* and *suertes* of land to which each settler was entitled, being concluded," he proceeded to the measurement of the *propios* of the said pueblo, and "the measurement having been made from the ——— and river below, unto the boundary which divides the lands of the said *pueblo* from those of the Mission of Santa Clara, from such measurement there result 1958 varas to the said boundary. Of this quantity the half is designated for *propios* of the pueblo, and *the remainder is to be considered royal land, (realengo,) together with all the rest of the land which is not comprehended in the portions of which possession has been given to the settlers,*" &c. We have in these proceedings a practical exposition of the laws in complete unison with the position on which we rely.

§ 145. There is another commentary of somewhat modern

date on the laws of Spain and the Indies, which I have cited to show that the landed property of the sovereign is not changed or in any manner qualified or restricted by any territorial demarkations whatever. The city of Havana in the Island of Cuba was founded in the year 1515. In its municipal ordinances, formed by the king's command and approved May 27th, 1640, authority was given to the *ayuntamiento* (see articles 63 to 72) to grant building lots as well as lands outside of the *pueblo* for keeping cattle, &c. (*Legislacion Ultramarina*, V. 3, p. 410.) They exercised this authority for above a century, but their grants or concessions did not convey the property according to the opinion of the *fiscal* of the royal *hacienda*, expressed in an *informe* dated Oct. 6th, 1797, (id. V. 6, p. 49, § 9) because he says "in those which I have seen I do not find that the grants were made in the royal name of his majesty, and as the whole soil of the island pertains to the royal patrimony the said *cabildos* (*ayuntamientos*) could not grant in any other mode, nor even in this without special authority from the sovereign."

§ 146. By a royal *cedula* of Nov. 23, 1729, they were prohibited from exercising this authority any longer, which as it lays down the law very clearly, I will transcribe:—"The king—council judiciary and government of San Cristobal of Havana. By a dispatch of this day I have thought proper to confirm and approve the sale which Jose Rodriguez made on the 27th March, 1721, before Miguel Hernandez Altuno, Notary Public of that city, to D. Antonio de la Luz, resident of the same, of some houses and lots (*solares*) which belonged to him in the place (*sitio*) called *Molinillo*, granted by you in the year 1699 to D. Pedro Garabuni and D. Jose Manuel Aleman, and transferred by the said Jose Rodriguez; and considering that you have no authority to concede *mercedes* lands and *solares* and effectuate the sales and transfer thereof as you did in case of those of the said Jose Rodriguez, and that it belongs and appertains to me exclusively to dispense such favors (*gracias*) and concessions, and in my royal name, to the sub-delegates who are appointed in that city to the

commission for the composition of lands, which (*appointment*) I have given to D. Diego de Zuñiga, minister of my council, by a dispatch of the 5th Dec., 1720, it has appeared meet to ordain and command as I do that henceforth you do abstain from granting *merced* lands and *solares* of that jurisdiction, which authority can alone be exercised by the said sub-delegates of the aforesaid commission for composition of lands, and recovery of forfeitures in virtue of the authority, which they may have received from the exclusive judge in this matter. Thus is my will ; dated in Serville 23d Nov., 1729, (Biblioteca de Legislacion Ultramarina, V. 6, p. 43.)”

147. The *ayuntamiento* did not pretend to have any right to four leagues or any quantity whatever of vacant lands within their jurisdiction, but represented to the king that it would be *convenient* that the authority for making grants and distribution of lands and *solares* should be continued to them, which gave occasion for another royal *cedula*, dated the 16th Feb., 1739. This, after reciting that the subject had been maturely considered in the council of the Indies, commands that the municipal government observe strictly what had before been enjoined and henceforth abstain from exercising the authority that had been delegated to it in the municipal ordinances, (articles above cited,) with respect to making grants and distribution of lands and lots within its jurisdiction, reiterating what is said in the former *cedula*, that the authority to do this resides exclusively in the sub-delegates of the royal hacienda (id. p. 44.)

§ 148. In 1836 a rapid increase of the population having taken place, and consequent advancement in the value of lands outside the walls, it became an object not only to put the vacant and unreclaimed lots in market but to investigate the right of those who had usurped the possession of some of them without just titles. They were accordingly disposed of (those that were vacant) on account of the royal treasury, the municipal government having no intervention in the business and interposing no claim to the lands, and those who were occupying without sufficient titles resorted not to the

municipal government but to the superintendent sub-delegate of the royal treasury, to procure a confirmation by way of composition, (id. V. 3, p. 313-14.)

§ 149. That towns by virtue of their establishment and demarkation of *terminos* (limited territory) become the owners of the lands embraced within such limits, or that they become the owners of four leagues square, or four square leagues, or any other specific quantity of land or other property, is an idea that does not seem to have its origin in Spanish countries. Any traces of such a doctrine will be sought in vain among the statutes, customs or opinions of commentators in those countries. "The *lex scripta* saith it is not in me, and the *lex non scripta* saith I know it not, go seek for it in the *lex ignota*."

§ 150. It did not occur to any body, it seems, when the *pueblo* of Manzanillo was incorporated, nor to the governor of Sinoloa, when he promulgated the order for assigning *ejidos* to the towns in that department, (2 Observador Judicial 265) nor to the king and council of the Indies, nor the illustrious ayuntamiento of the city of Havana, when that corporation was absolutely inhibited from granting *any* lots or lands whatsoever, within its jurisdiction, and the building lots or other lands were assumed without dispute to be the property of the king, nor was any such right recognized or alluded to when by a special royal decree the ayuntamiento of the city of Mexico was authorized for the first time to grant building lots, although that *nobilisime* (most noble) and loyal city had then been established and incorporated under the Spanish rule for a period of more than one hundred and seventy-five years. No such right is recognized nor referred to in the royal regulation of 24th October, 1781, Tit. 14, respecting the establishment of towns in California, nor in the proceedings giving possession to the *pobladores* of *San Jose* and Monterey, out the lands of that town, nor in the decree of the Spanish *cortes* of 4th Jan., 1813, in which all the land within the limits of the towns, except those of the *propios*, are regarded as the property of the nation; no

such right is recognized in L. 9, Tit. 21, Lib. 7, N. R., and L. 20, T. 12, Lib. 4, R. I., prohibiting the towns to grant *any* lands within their limits, nor in L. 22, T. 12, Lib. 4, R. I., granting *special authority* to the *villa* of *Tolu* to make distribution to settlers of certain lands within its *termino* or demarcation; nor in L. 14, T. 7, Lib. 4, R. I., authorizing the viceroys to set apart lands in one town for the *propios* of other towns, which may be destitute, nor in the law of the Mexican congress of April 13, 1828, granting the lands known as *Desierto Viejo*, to the *pueblos*, to which it was contiguous, of the district of *San Angel*, for distribution, in the mode specified in that act; nor in L. 1, 4, 5, 6, 7 and 8, T. 12, Lib. 4, R. I., conferring upon the viceroys and presidents of the *audiencias* the exclusive authority to grant and distribute lands and lots *within*, as well as without the limits of towns, nor in the royal Instruction of October 15, 1754; nor in the 81st Art. of the *Ordenanza de Intendentes* of December 4, 1786; nor in any of the laws and regulations of the Mexican Republic on the subject of colonization.

§ 151. On the contrary, the doctrine referred to is repudiated by all the laws and all the commentators, and the practice of the government in all ages, as well as by common reason itself. The errors which have been committed on this subject, have arisen in part from our not understanding well the agrarian laws of Spain, and not comprehending the peculiarities of the political system of that country, of which the *ayuntamientos*, *consejos*, *cabildos*, *curias*, or *regimientos*, of the towns and cities, have always constituted an essential part, having an intervention in every matter of government affecting persons or things within their *terminos* or jurisdiction. But we have also been misled by translators, who, without any knowledge, such as could only be acquired by a thorough acquaintance with the codes and the law writers, of the meaning and application of legal terms, have, by a dash of the pen made at random, laid down the law for us on the most abstruse subjects.

§ 152. In order that a town may grow up, it is not neces-

sary, nor has it ever been the practice in Spain or Mexico, nor in any other country that I know anything about, for the government to grant the land on which it is founded, to any body but the settlers individually—to each one the portion which he is permitted to occupy. Why should the government grant the lots intended for private use, to the corporation, even after the town comes to be erected into a corporation? These lands are not destined to the use of the corporation, but to private use exclusively, and if the government should grant them to the corporation, it could be only with the object that the corporation should re-grant them to individuals.

§ 153. Would it not be as well for the government, in the first instance, to grant the lots, directly through its local agents, to those for whose use they are destined? Such seems to have been the policy of Spain, which has not been changed by any legislation of the Mexican Republic. “Let the *solares* be distributed by lot to first settlers, continuing from those which correspond to the *plaza mayor*, and let the rest remain for *us* to make grant thereof to those who shall afterwards come to settle, or whatsoever our pleasure may be.” (L. 11, T. 7, Lib. 4, R. I.) And in the regulation for California, of October 24th, 1781, after enjoining upon the governor to distribute in the king’s name one building lot (*solar*) and four *suertes* of land for cultivation, to each original settler, it is provided, “and of the rest, grants shall be made by the *governor in the name of his majesty*, to those who newly come to settle, as likewise of the respective *solares*,” The same policy was observed in the colonization laws of Mexico, which necessarily comprehend the formation of towns. These laws make no provision for granting *any* lands to towns, much less do they contemplate the idle ceremony of granting to towns, lands which are intended for the use of individual settlers, in order that the towns may re-convey them for that purpose. Municipal corporations which, as we have already seen, are under the perpetual tutilage of government, and without its especial license,

could not alienate anything whatever, that belonged to them, were not invested with the property in those lands which were intended to be alienated as fast as they could be settled.

§ 154. The regulation of November 21, 1828, contains the authority for the distribution of lands, in towns as well as elsewhere in the territories of the Mexican Republic. It is delegated by the supreme government to the *gefes politicos*, and Territorial Deputations, and these have in their turn delegated the power, with such restrictions as they have thought proper to impose, to other inferior authorities. It is provided in this regulation, that the land to be granted for a building lot (*solar*) shall be one hundred varas, (art. 15,)—that the union of many families into a town (*poblacion*) shall conform, in its formation, government, and interior police, to the rules established by the laws in force for the other towns of the republic, taking especial care in the new ones that they be built up with all possible regularity, (art. 13,)—that no contract, however, for founding a new town shall be entered into, unless the contractor bind himself to present at least twelve families as *pobladores*, (original settlers.) In this *regulation*, and the 16th section of the colonization law of August 18, 1824, must be sought the authority to grant and distribute lots. The power resides, by law, in the supreme government of the republic, and by the regulation referred to, has been delegated to the territorial governments, which have again sub-delegated the same power, under restrictions to other subordinate authorities. Subsequent to the regulation of 1828, and after the establishment of the constitution of 1836, the power to regulate the distribution of lands in towns, was conferred upon the prefects, (law of March 20, 1837, art. 77,) a provision which was adopted by Congress from the constitution of the State of Mexico (art. 155). The 16th section of the general colonization act of the Mexican Congress of August 18th, above referred to, provides that “the *government*, in conformity with the principles established in this law, shall proceed to colonize the territories of the republic.” The

President, by the regulation of November 21, 1828, committed to the Governors and Territorial Deputations a portion of the authority which the law confers on the government alone. It would seem to have been judged by the Mexican government that the power, so far as regards the granting of lands and lots to "*contractors, families, and private persons*, may be delegated. By the first article of the act of Congress of March 20, 1837, it is provided that—"The interior government of the departments shall be committed to the Governors, Departmental Juntas, prefects, sub-prefects, ayuntamientos, alcaldes, and justices of the peace." Where does this authority begin, and where must it end? It must begin with the government, the supreme executive, and under the authority, rules and restrictions which may be given and prescribed, be continually exercised by the constitutional agents and subordinates of the government, no one having any power to act without the direct authorization of his superior. It follows, from the above, that the power exercised by the municipal authorities in the towns of California in granting lands or lots, must have been derived, so far as they possessed it, from the government of the department or from the prefect; *no other authority ever has been, or ever can be shown.*

§ 155. It is strange that we should have committed any mistake in respect to the source from which the authority is derived, for granting town lots in those places which have grown up on lands belonging to the Mexican nation. In towns which may grow up on private lands no one would doubt that the authority for granting lots would reside solely in the proprietor and his duly constituted agents.

§ 156. It is true that *poblaciones* (towns) are not permitted to be founded without license from the supreme power of the State, (*Compendio del Derecho Publico y Comun de Espana*, vol. 1, p. 330. *Ordenanzas de Tierras y aguas*, p. 80.) But the prohibition or the license to form *poblaciones* has nothing to do with the property in the lands which may be occupied for that purpose. That must be acquired from the lawful owner. A simple reference to the archives of the depart-

mental government, and to the records of grants made prior to the American conquest in the place called Yerba Buena, and in the secularized mission of San Francisco would have set us right on this point. The local authorities, or municipal, of the mission and so called *pueblo* of San Francisco, by whom these grants were made in the two places referred to, never pretended to have any inherent power or authority, *ex-officio*, to make them, much less did they claim for the town any property in the lands granted, but acknowledged that the authority was derived from the departmental government, taking especial care to have this appear on record in the book of protocols, for the security of the respective grantees.

§ 157. I have, in the preceding argument, cited a few of the many authorities which exist in support of the positions, with which I commenced this portion of my argument. The ample field is not half exhausted ; for, to quote the expression of Mr. Comr. Thompson on this point,—“authorities might be multiplied almost indefinitely to sustain this position ; indeed, we find the principle pervading all the laws of Spain and Mexico on the subject, and uniformly recognized in their application by the authorities whose duty it was to carry them out ;” but, the short period of time to which I have been limited for the preparation of this brief, precludes me from pursuing the subject as far as I could wish by the addition and illustration of other authorities, as well as from arranging and applying those already cited, in the concise and perspicuous manner with which a brief for this Court should be prepared. If any one should be desirous of pursuing the investigation of the subject further, he will find it most ably and thoroughly elucidated in the elaborate and convincing argument of Hon. Horace Hawes before the Board of U. S. Land Commissioners, in the case of the United States *vs.* the City of San Francisco, in which the entire subject is exhausted, and from which I have derived great assistance in the preparation of this brief, and which, indeed, I have not hesitated to use whenever it suited the purposes of my argument. Enough authorities, however, have been brought forward to establish the following conclusions :—

§ 158. That, after the limits of towns have been legally established, which can only have been done by act of the supreme authority, the sovereign remains the absolute owner of all the lands within those limits, to which a legitimate title cannot be shown by individuals or corporations; that, as such, he may freely donate, or distribute them; that he may alter, restrict, or enlarge the limits, once assigned to any town, or revoke them, at pleasure; and, that no town can acquire any right, even to the use of the lands embraced in them, *as against the sovereign*, unless by special grant, or immemorial prescription, that is, in the same manner as any individual, or other corporation; and that the right of common, which the citizens enjoy, though exclusive of those of other towns, is not in exclusion of the sovereign's right of property and possession, and, consequently, the only acts which the municipal authorities can do, affecting these lands, are such as are purely administrative, and belong to the local jurisdiction conferred by the charters.

§ 159. I now take leave of this the first proposition, which I stated in the commencement, I should maintain, with the expression of the thorough conviction resting on my mind, that, if the Court shall not be convinced of the correctness of my positions, they will be three of the only four men in the State or elsewhere, who will remain unconvinced by such a mass of authority, against none whatever on the other side—and that, if the case of *Cohas vs. Raisin* shall be permitted longer to disgrace the jurisprudence of this State by being upheld as authority, it will not be, because it can be deemed to have been decided in accordance with law.

I did intend to argue another proposition, which I stated in the outset—but, on further reflection, I have come to the conclusion to abandon that, not because it is untenable, but for the reason, that I am satisfied to leave the case upon the point on which I have already occupied so much of the time and attention of the Court.

NATH'L BENNETT,
Of Counsel for Defendant.





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